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NO. _____

IN THE

Supreme Court Of The United States

October Term, 1988

ALABAMA DEPARTMENT OF EDUCATION, DEPARTMENT OF DISABILITY DETERMINATION SERVICE, THE PERSONNEL BOARD OF THE STATE OF ALABAMA,

Petitioners,

v.

LARRY L. POWERS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

This case presents the identical issues which are before the Supreme Court in *Wards Cove Packing, Inc. v. Atonio,* 827 F.2d 439 (9th Cir. 1987), *cert. granted,* 108 S.Ct. 2896 (June 30, 1988), and this Court's decision in *Wards Cove Packing* will be dispositive of the present case.

In the present case, the Court of Appeals expressly refused to follow the plurality decision in *Watson v. Fort Worth Bank & Trust,* ___ U.S. ___, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988). Having refused to follow *Watson,* the Court held that the plaintiffs in an employment discrimination case are not required to identify the specific employment practices which are challenged as having disparate impact and that the burden of proof on the issue of business necessity rests with the defendant.

Accordingly, like the *Wards Cove Packing* case, this case presents the following issues:

1. Whether the plaintiff in a disparate impact case under Title VII of the Civil Rights Act of 1964 has the burden of identifying at the outset the employment practices which have allegedly resulted in disparate impact.

2. Whether in a disparate impact case under Title VII of the Civil Rights Act of 1964, the defendent employer carries the burden of proof on the business necessity defense.

The added twist in the present case is that the Court of Appeals not only allowed the plaintiff-respondents to proceed beyond the outset of the case without any identification of the employment practices being challenged but allowed them to identify such practices for the first time after the appeal.

LIST OF PARTIES

The parties to this case in the Court of Appeals were as follows:

Alabama Department of Education, Department of Disability Determination Service

Personnel Board of the State of Alabama

Carl E. Davis

A class composed of all black professional employees of the Disability Determination Service, Alabama State Department of Education, who were denied, may have been denied, or may be denied promotion to the positions of Examiner II, Examiner III, Supervisor I, and Supervisor II from 1977 until the present; and

A class composed of all black professional employees of the Disability Determination Service, Alabama State Department of Education, who were denied, may have been denied, or may be denied appointment to the position of Assistant Unit Supervisor from 1977 until the present.

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NO. _____

IN THE

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October Term, 1988

ALABAMA DEPARTMENT OF EDUCATION, DEPARTMENT OF DISABILITY DETERMINATION SERVICE, THE PERSONNEL BOARD OF THE STATE OF ALABAMA,

Petitioners,

v.

LARRY L. POWERS, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners Alabama Department of Education, Department of Disability Determination Service, and the Personnel Board of the State of Alabama respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on September 14, 1988.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported as *Powers v. Alabama Department of Education,* 854 F.2d 1285 (11th Cir. 1988) and is reproduced in the Appendix at page A-3. The Court of Appeals denied the respondent's Petition for Rehearing on January 3, 1989. The denial of the Petition for Rehearing is reproduced in the Appendix at page A-1. The Memorandum Opinion of the District Court is not officially reported, but an unofficial report of the District Court's Opinion appears *sub nom. Davis v. Alabama Department of Education,* 43 Empl. Prac. Dec. (CCH) ¶ 37,226 (N.D. Ala. 1987), and is reproduced in the Appendix at page A-29.

JURISDICTION

The judgment of the Court of Appeals was entered on September 14, 1988. The respondents filed a timely Petition for Rehearing on October 4, 1988, after the time for filing the Petition was extended by the Court of Appeals. On January 3, 1989, the Court of Appeals denied the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), is relevant to this case and provides as follows:

> "(a) Employer practices
> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . . "

STATEMENT OF THE CASE

Respondent Carl E. Davis filed a complaint on behalf of himself and a class of similarly situated employees of the Disability Determination Service ("DDS") of the State of Alabama's Department of Education. The complaint raised claims under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 and included allegations of discrimination on the basis of race in promotions at the DDS. The jurisdiction of the District Court was invoked under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and under 28 U.S.C. § 1331.

A. *The Challenged Employment Practices.*

The case concerned the jobs of Examiner II and III and Supervisor I, II, and III which are State merit system jobs and are governed by the procedures of the State Personnel Department with respect to promotions.

The procedure for promotions in these jobs is as follows. Announcements of the taking of applications are posted, and DDS employees wishing to be considered for a promotion file an application with the State Personnel Department, which then ranks the applicants and places their names on a register. The factors used by the State Personnel Department to rank the names on the register are (a) the applicant's training and experience, which constitutes 90% of the ranking, and (b) the average of the last three annual employee performance evaluations (called "service ratings"), which constitutes 10% of the ranking. The applicants are placed on certifications of eligibles in the order of their rank on the register as job openings occur, and the certifications are provided to the DDS for selection of the applicant to be promoted.

This procedure embodies the requirement that promotions are to occur in the order of the jobs and without by-passing a job. For example, an employee on the Examiner II job can apply for the Examiner III job but cannot by-pass the Examiner III job and jump directly into the Supervisor I job.

The DDS also has an "in-house" position known as Assistant Unit Supervisor, which is not a State merit system job, is not subject to the promotional procedure, and is not involved in this petition for certiorari.

B. *The District Court's Decision.*

At the trial, the plaintiff-respondents' contentions on the disparate impact theory related solely to the question of whether the annual service ratings had a discriminatory impact on register rank and, therefore, on promotions.

Following the 6-day trial, the District Court entered its Opinion and Judgment for the defendant-petitioners. Specifically, the District Court found (1) that the respondents failed to prove the class-wide claim of disparate treatment in promotions; (2) that the service ratings had no disparate impact; (3) that selection for the Assistant Unit Supervisor assignment was not discriminatory; and (4) that the respondent failed to prove his individual disparate treatment claim of discrimination. 43 Empl. Prac. Dec. at 47,933-34; Appendix pp. A-48 to A-49. Respondents timely filed an appeal to the Court of Appeals.

C. *The Court of Appeals' Decision.*

In the District Court, the subject of the disparate impact claim was the service ratings, the theory being that the service ratings were discriminatory and that, through their constituting 10% of the ranking order, they impacted adversely on promotions. This contention was refuted by the evidence, was rejected by the District Court, and has disappeared from the case.

Instead, in the Court of Appeals, the plaintiff-respondents presented additional contentions which they had not raised at trial and which were not addressed by the District Court's decision. Specifically, on appeal the respondents contended the following components of the promotional process resulted in adverse impact: (1) the requirement that advancement proceed in the order of the jobs, (2) the requirement

that applicants have minimum experience, (3) the 90% training and experience ranking factor, and (4) the development of registers and certifications of eligibles.

In practical terms, the plaintiff-respondents identified the challenged employment practices after the trial, after the District Court's decision, and after the appeal had been taken.

The decision of the Court of Appeals was rendered on September 14, 1988. The Court of Appeals affirmed the District Court's finding that the respondents failed to prove their class-wide claim of disparate treatment in promotions. The Court of Appeals also affirmed the District Court's denial of the named plaintiff's individual disparate treatment claim.

With respect to the issue regarding the selection of employees for the "in-house" Assistant Unit Supervisor position, the Court of Appeals remanded this issue to the District Court on the ground that the District Court failed to provide reviewable findings on the subject.[1]

The crux of the case as it now stands is the class-wide disparate impact claim. The Court of Appeals reversed the District Court and remanded this aspect of the case for further proceedings based on the respondents' allegations that employment practices which were not identified by the respondents at trial had disparate impact. In doing so, the Court of Appeals refused to apply the Supreme Court's plurality opinion in *Watson* in two respects.

First, despite the petitioners' argument that plaintiffs cannot challenge employment practices which were not identified by them in the District Court, the Court of Appeals held that plaintiffs are not required to identify the employment practices which are being challenged. As expressed by the Court:

> "Whatever impression they [petitioners] and, apparently, the district court may have been under, plaintiffs

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[1]Petitioners do not seek review of the Court of Appeals' remand of this issue relating to the Assistant Unit Supervisor position.

> alleging class-wide discrimination in promotions are not required to isolate the particular aspect of the promotional process that is responsible for the discriminatory impact." 854 F.2d at 2293; Appendix p. A-13.

While acknowledging that the Supreme Court addressed this very issue in *Watson v. Fort Worth Bank & Trust,* ___ U.S. ___, 108 S.Ct. 277, 101 L.Ed.2d 827 (1988), the Court of Appeals expressly refused to follow *Watson* and applied a standard that directly conflicts with a plurality of the Supreme Court:

> "[W]e are aware that four Supreme Court Justices have stated that it is the plaintiff's responsibility to identify at the outset all of the practices he or she is challenging, *see Watson*, 108 S.Ct. at 2788, but until this view is accepted by the full Court, we are bound to follow *Griffin v. Carlin,* 755 F.2d 1516 (11th Cir. 1985)]." 854 F.2d at 1293 n. 13; Appendix p. A-14.

Second, the Court of Appeals further imposed on the petitioners a burden of proof which directly conflicts with the proposition expressed by the *Watson* plurality that in a disparate impact case, the burden of proof remains with the plaintiff. Instead, the Court of Appeals said that:

> "We are aware that four members of the Supreme Court recently have indicated that the burden of proof on the absence of business necessity rests with the plaintiff. *See Watson v. Forth Worth Bank & Trust,* ___, U.S. ___, 108 S.Ct. 2777, 2790, 101 L.Ed.2d 827 (1988). A plurality opinion, however, is not binding precedent, and in the meantime, we are bound by several decisions of this court (as well as the Supreme Court cases cited in the text) stating flatly that the employer bears the burden of *proving* that a practice is job-related." 854 F.2d at 1292 n. 11; Appendix p. A-11-12 (emphasis in original).

On these grounds, the Court of Appeals reversed the District Court's finding that the respondent had failed to prove a case of disparate impact in promotions.

REASONS FOR GRANTING THE WRIT

I.
THE PETITION PRESENTS ISSUES IDENTICAL TO THOSE PENDING BEFORE THE SUPREME COURT.

The outcome of this case will be governed by the Supreme Court's decision in *Wards Cove Packing, Inc. v. Atonio,* 827 F.2d 439 (9th Cir. 1987), *cert. granted,* 108 S.Ct. 2896 (June 30, 1988), because the petition presents the identical issues which are presented by the *Wards Cove Packing* case. These issues are (1) whether the plaintiff in a disparate impact case has the burden of identifying at the outset the employment practices that have allegedly resulted in disparate impact, and (2) whether the defendant employer has the burden of proof on the business necessity defense.

Because the issues in this case are identical to the issues pending before the Supreme Court in the *Wards Cove Packing* case, it is entirely appropriate for the Court to grant the petition for a writ of certiorari, hold a decision on the merits in abeyance pending the outcome of the *Wards Cove Packing* case, and then summarily decide the merits of the petition based on the outcome of *Wards Cove Packing. See e.g., Helvering v. Weise,* 292 U.S. 614 (1934) (Court granted certiorari and reversed judgment summarily on the authority of intervening Supreme Court decision).

Accordingly, the petitioners respectfully request that the Court grant this petition, postpone consideration of the merits of this case until the *Wards Cove Packing* case has been decided, and then decide this case summarily.

II.
THE COURT OF APPEAL'S DECISION DIRECTLY CONFLICTS WITH THE PLURALITY DECISION OF THIS COURT IN *WATSON*.

Even if the identical issues were not pending before the Supreme Court in the *Wards Cove Packing* case, certiorari would be appropriate because of the importance of the legal issues presented.

The scope of the disparate impact theory, and the respective burdens of proof for the employee and employer under the theory, are issues which have occupied the Court's attention repeatedly since the theory was first recognized in 1971 in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). More recently, the Court has focused its attention specifically on the very issues raised in this petition. *See Watson v. Fort Worth Bank & Trust*, ___ U.S. ___, 108 S.Ct. 2777, 101 L.Ed.2d 827(1988; *Wards Cove Packing, Inc. v. Atonio*, 827 F.2d 439 (9th Cir. 1987), *cert. granted*, 108 S.Ct. 2896 (June 30, 1988).

Under traditional Title VII disparate impact analysis, the burden of proof shifted to an employer to demonstrate that a practice having a statistically significant racially disproportionate impact was justified by business necessity. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). The Court of Appeals in this case adopted this traditional approach based on Eleventh Circuit precedent. 827 F.2d at 1292; Appendix p. A-11-12. *See, Craig v. Alabama State University*, 804 F.2d 682, 689 (11th Cir. 1986); *Crawford v. Western Electric Co.*, 745 F.2d 1373, 1384 (11th Cir. 1984).

The validity of the burden of proof standard applied by the Eleventh Circuit is in serious doubt following the Supreme Court's decision in *Watson*. The plurality decision in *Watson* says that the defendant's burden is one of production, not proof. Under *Watson*, the burden of proof remains with the plaintiff and is not shifted to the defendant. As expressed in the plurality opinion in *Watson*:

> "Although we have said that an employer has 'the burden of showing that any given requirement must have a manifest relationship to the employment in question,' *Griggs*, 401 U.S. at 432, such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. On the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times. Thus, when a plaintiff has made out a prima facie case of disparate impact, and when the defendant has met its burden of producing evidence that its

> employment practices are based on legitimate business reasons, the plaintiff must 'show that other tests or selection devices, without a similarly undersirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship.' *Albermarle Paper Co.*, 422 U.S. at 425. . . ."

The *Watson* plurality also clearly stated that the plaintiff's burden of proof at the outset of a disparate impact case includes the identification of the specific employment practices complained to result in disparate impact:

> "First, we note that the plaintiff's burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer's work force. The plaintiff must begin by identifying the specific employment practice that is challenged. . . . [T]he plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."

The Court of Appeals' express acknowledgement that its decision conflicts in these two highly significant respects with the *Watson* plurality is a compelling reason for granting certiorari. The Court of Appeals consciously and intentionally disregarded the plurality's instruction on these issues, thus creating a conflict between the *Watson* plurality and the Eleventh Circuit. The petition for certiorari should be granted to permit the Supreme Court to settle the issues which the *Watson* plurality decision addressed but has not settled because of the Court of Appeals' refusal to follow the plurality decision. *See American Textile Manufacturers Institute v. Donovan,* 452 U.S. 490, 495 (1981) (certiorari appropriate where Supreme Court addressed but failed to decide issue in previous term); *United States v. Martinez-Fuerte,* 428 U.S. 543, 545 (1976) (certiorari appropriate where Supreme Court reserved issue for future resolution). Failure to do so would result in the Eleventh Circuit continuing to apply standards which directly contradict the clear statements of the Supreme Court in *Watson.*

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and summarily grant judgment in the case following the Court's decision in *Wards Cove Packing, Inc. v. Atonio*, 108 S.Ct. 2896 (June 30, 1988). Alternatively, the Court should grant the petition for a writ of certiorari and independently review the Court of Appeals' decision to determine the extent to which the Court will follow the plurality decision in *Watson*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel, a member of the Bar of this Court, certifies that three true and correct copies of the foregoing Petition for a Writ of Certiorari were served on the following by United States mail, first class postage paid, this 31st day of March, 1989:

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APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-7259

LARRY L. POWERS, ET AL,

Plaintiffs-Appellants

CARL E. DAVIS, individually

CLASS A: ALL BLACK PROFESSIONAL EMPLOYEES OF THE DISABILITY DETERMINATION SERVICE, ALABAMA STATE DEPARTMENT OF EDUCATION, WHO WERE DENIED, MAY HAVE BEEN DENIED, OR MAY BE DENIED PROMOTIONS TO THE POSITIONS OF EXAMINER II, EXAMINER III, SUPERVISOR I, AND SUPERVISOR II FROM 1977 UNTIL THE PRESENT.

CLASS B: ALL BLACK PROFESSIONAL EMPLOYEES OF THE DISABILITY DETERMINATION SERVICE, ALABAMA STATE DEPARTMENT OF EDUCATION, WHO WERE DENIED, MAY HAVE BEEN DENIED, OR MAY BE DENIED APPOINTMENT TO THE POSITION OF ASSISTANT UNIT SUPERVISOR FROM 1977 UNTIL THE PRESENT.

versus Plaintiffs-Appellants

ALABAMA DEPARTMENT OF EDUCATION, DEPARTMENT OF DISABILITY DETERMINATION SERVICE, THE PERSONNEL BOARD OF THE STATE OF ALABAMA,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING
JANUARY 3, 1989

BEFORE: JOHNSON and CLARK, Circuit Judges, and DUMBAULE*, Senior District Judge

PER CURIAM:

The petition(s) for rehearing filed by the appellants Carl E. Davis, et al. is denied.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark

United States Circuit Judge

APPENDIX B

Larry L. POWERS, et al., Carl E. Davis, individually, *Class A:* All Black Professional Employees of the Disability Determination Service, Alabama State Department of Education, who were denied, may have been denied, or may be denied promotions to the positions of Examiner II, Examiner III, Supervisor I, and Supervisor II from 1977 until the present. *Class B:* All Black Professional Employees of the Disability Determination Service, Alabama State Department of Education, who were denied, may have been denied, or may be denied appointment to the position of Assistant Unit Supervisor from 1977 until the present, Plaintiffs-Appellants,

v.

ALABAMA DEPARTMENT OF EDUCATION, Department of Disability Determination Service, The Personnel Board of the State of Alabama, Defendants-Appellees.

No. 87-7259.

United States Court of Appeals,
Eleventh Circuit

Sept. 14, 1988.

Appeals from the United States District Court for the Northern District of Alabama.

Before JOHNSON and CLARK, Circuit Judges, and DUMBAULD*, Senior District Judge.

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*Honorable Edward Dumbauld, Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

CLARK, Circuit Judge:

Appellant Carl Davis,[1] a black, is a disability determination examiner employed by appellee, State of Alabama Department of Education's Ability Determination Service ("DDS"). He appeals from a judgment against him, and the class of similarly situated employees he represents ("the plaintiffs"), on their Title VII[2] and section 1981[3] claims[4] that DDS[5] discriminated in its promotion practices and in selecting assistant supervisors. Recognizing that there were some flaws in the district court's analysis, as well as the parties' presentation, of the case, we affirm in part and reverse and remand in part.

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[1]Larry Powers was a plaintiff when the suit was filed, but his claim was voluntarily dismissed with prejudice from the case on October 8, 1982.

[2]In relevant part, Title VII provides that "[i]t shall be an unlawful employment practice for an employer — (1) . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e-2(a)(1) (1982).

[3]In relevant part, section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981 (1982).

[4]Employment discrimination claims may be brought either under Title VII or section 1981. This court has held, however, that a section 1981 plaintiff must prove that an employer acted with discriminatory intent. *See Stallworth v. Shuler*, 777 F.2d 1431, 1433 (11th Cir. 1985). Under Title VII, a plaintiff may succeed even without such a showing of intent if he proves that a facially neutral practice has a discriminatory impact on his racial group and the defendant does not prove that the practice is strictly job-related. *See Connecticut v. Teal*, 457 U.S. 440, 446, 102 S.Ct. 2525, 2530, 73 L.Ed.2d 130 (1982); *Dothan v. Rawlinson*, 433 U.S. 321, 324, 97 S.Ct. 2720, 2726-27, 53 L.Ed.2d 786 (1977). The reader should thus be aware that all references to disparate treatment implicate both the plaintiffs' section 1981 claims and their Title VII claims, while the references to disparate impact implicate only Title VII.

[5]Because it administers several of the promotion procedures challenged by the plaintiffs, the Personnel Board of the State of Alabama ("SPD") is also a defendant/appellee. DDS & SPD argue that SPD has been in the case from the very beginning only as a necessary party under Fed.R.Civ.P. 19, and that to the extent Davis now challenges procedures implemented exclusively by SPD, he has expanded the case well beyond the basis on which it was tried. This dispute will be addressed later in the opinion. *See infra* part I.A.1.

BACKGROUND

DDS is the state agency responsible for implementing the federal Social Security disability program in Alabama. DDS employees determine whether citizens' applications for disability benefits should be granted. Each employee (with the exception of the Assistant Director and Director) fills a position identified by a pay grade. The grades at issue here, in the order in which an employee would progress through them, are Examiner I (E-I), Examiner II (E-II), Examiner III (E-III), Supervisor I (S-I), Supervisor II (S-II), and Supervisor III (S-III). From 1976 to 1983, the only dates for which the record reveals workforce statistics, the workforce was 26.8% black.

In addition to the pay grade classification system, there are special job assignments, such as Assistant Unit Supervisor, Quality Assurance Specialist, and Vocational Specialist. These jobs do not carry increases in pay, but many employees believe they entail more desirable work. Because Davis makes distinct claims that DDS has discriminated against blacks in promotions, i.e., moving up through the pay grades, and in assignments to the position of Assistant Unit Supervisor, the procedures for promotions and job assignments will be discussed separately.

During the period this lawsuit covers, the promotions procedure was as follows. First, an employee had to work the positions in order (the "job-progression" requirement): one could not, for example, become an E-III from an E-I position. Second, there were certain minimum experience requirements: to become an E-II, an employee had to serve one year as an E-I; to become an E-III, an employee had to serve one year as an E-II; to become an S-I, an employee had to have permanent status[6] as an E-III and "at least one year's supervisory experience in disability determination"; and to become an S-II, an employee had to have permanent status as an S-I. Third, the employee had to *apply* for a higher

[6] The record does not reveal the requirements for "permanent" status or how such status was distinguish from any other kind. Neither party has asserted that the distinction is meaningful to this lawsuit.

position. Applications were solicited and accepted only during a period specified by a job announcement. These announcements were not posted regularly.[7] When a vacancy or a need for additional positions arose, the Director of DDS, Dr. John Shelton, would contact the Personnel Board of the State of Alabama ("SPD"), tell SPD he wanted to fill a position, and SPD would distribute the announcement. Applications were sent directly to SPD; no one at DDS knew who had and had not applied.

After receiving applications, SPD would develop a "register" for the particular pay grade. The register listed everyone who had applied and was eligible in order of what SPD determined their qualifications to be. The applicants were ranked by SPD on the basis of three criteria. Forty-five percent of the ranking was based on the applicant's training in disability determination, college and post-graduate degrees and the like. Another 45% was derived from the applicant's experience, the length of time an applicant had worked in disability determination and the positions in which he or she had served. These two factors combined were referred to as the training and experience ("T & E") score. The final 10% of an applicant's ranking depended on his or her evaluations by supervisors while working at DDS. An applicant's scores on the last three evaluations were averaged to arrive at the 10% factor.

After the applicants were ranked, there was a further culling process: the highest ranking applicants were placed on a list called the "Certificate of Eligibles" ("CE"), or "certified." Only applicants who made it onto the CE were actually interviewed for the position they sought. The number of persons on the CE varied with the number of positions to be filled. For the first position open, ten names had to appear on the CE. For every position thereafter, one additional name had to appear. Due to a court order issued in *United States v. Frazer,* 317 F.Supp. 1079, 1981 (M.D.Ala.

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[7]According to the Director of DDS Personnel, James Methvin, there was no maximum time between job postings, but there was a minimum period. At least one year had to pass before a new job announcement was posted.

1970), blacks who were next in line on the CE could not be "passed over," although while applicants could be.

For most of the period this lawsuit covers, 1977-1982, the process of becoming an Assistant Unit Supervisor (AUS) at DDS was considerably less formal than the promotion process. There might or might not be a job announcement, and thus employees might or might not file a formal application. Employees at the E-I, E-II, and E-III levels apparently were all eligible for the job. In most instances, the unit supervisor, the area supervisor, and the Assistant Director simply selected the employee they thought best suited for the position. One unit supervisor, however, indicated that he was essentially told by Shelton, the director, who would be chosen to assist him.

In 1982, a reclassification study conducted by SPD merged the AUS position into the promotion system. From then on, only E-III's were eligible to serve as an AUS, and employees were selected for the position just as they were for any other E-III position. Several of the employees serving as AUS's at the time the position was reclassified were automatically given E-III status.

At trial, Davis relied on the testimony of several class members as well as an expert who presented several statistical studies. DDS also relied on the testimony of an expert, as well as Director Shelton, Personnel Director James Methvin, and several of the class members' immediate supervisors. The district court, sitting without a jury, entered findings of fact and concluded that the plaintiffs had failed, on both of their claims, either to make out a prima facie case or to prove that DDS' various actions were not justified. The district court also found that the state merit system used by DDS was "a permissible use of the seniority system." Final judgment Order at 2 (Mar. 27, 1987).

I. DDS' Promotion Practices

With respect to the plaintiff's challenge to DDS' promotion practices, the district court ruled that they had failed either to make out a prima facie case or to "carry the burden of proof at the third stage of the presentation of evidence."

Final Judgment Order at 2 (Mar. 27, 1987). The ambiguity of this statement appears to reflect the district court's efforts to integrate its disparate treatment and disparate impact analyses. Because we believe that the law remains in sharper focus if those analyses are not confused, we address them separately.

A. *The Allegation of Disparate Treatment*

Whenever a plaintiff proceeds upon a theory of disparate treatment, he or she must establish by a preponderance of the evidence that the employer acted with discriminatory intent. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981); *Hill v. Metropolitan Atlanta Rapid Transit Authority,* 841 F.2d 1533, 1538 (1988). If the case is fully tried, the court generally should not refer to the various "stages of proof,"[8] for the only issue at that point should be whether the plaintiff proved the employer's discriminatory intent. *United States v. Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 716, 103 S.Ct. 1478, 1481-82, 75 L.Ed.2d 403 (1983); *Burdine,* 450 U.S. at 255 n. 10, 101 S.Ct. at 1095 n. 10. Whether the employer acted with such intent is a purely factual question subject to reversal only if the fact finder was clearly in error. *Pullman-Standard v. Swint,* 456 U.S. 273, 288-89, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982).

Applying these principles to the district court's opinion, we are troubled by the court's references to the plaintiffs' "prima facie case" and "third stage" burden of proof, and to DDS's "articulated legitimate nondiscriminatory reasons." Even so, on reading the opinion as a whole, we are convinced that the court reached its conclusion that DDS acted without discriminatory intent without relying excessively on the tripartite evidentiary structure. If is clear from the court's discussion that it believed there were significant flaws in the

[8]*See McDonnell-Douglas Corp. v. Green,* 411 U.S. 792, 805, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1973) (discussing the evidentiary framework for Title VII cases in terms of three stages of proof: the prima facie case, the rebuttal, and the showing of pretext).

plaintiffs' statistical evidence and that it credited the testimony of the DDS personnel over that of the class members. We therefore proceed to determine whether the district court's finding was clearly erroneous.

The plaintiffs' evidence at trial was both statistical and anecdotal. Their expert, a biostatistics professor at the University of Alabama, presented a study indicating that of all the promotions awarded, whites received a disproportionate number of the higher-level promotions and blacks a disproportionate number of the lower-level ones. *See* Record, Pl. Exh. 23. Several plaintiffs testified that white employees hired concurrently with or after them had received promotions faster. *See, e.g., id.,* Vol. III at 101-02, 283. Several plaintiffs also testified that their supervisors had stated that the Director, Dr. Shelton, had instructed the supervisors to lower certain class members' evaluations scores. *See, e.g., id.,* Vol. II at 38, Vol. III at 280, Vol. IV at 344. Carl Davis insisted that his supervisor had made this statement six years in a row. *See id.,* Vol. II at 38. A woman named Lovie Marable related that Shelton had attempted to have her sign a release stating that she would pass up the E-III position for which she was next in line. *See id.,* Vol. III at 294.

DDS responded to most of these allegations. A consultant versed in employment discrimination statistics testified that the plaintiffs' statistical study could not be relied upon because it did not address whether blacks had applied or been certified for the promotions at issue. *See id.,* Vol. VI at 781-84. The Personnel Director, James Methvin, testified that only three whites were hired concurrently with or after Davis and yet promoted earlier, and explained that two of these had several years of experience prior to joining DDS and the last was working in the Mobile office where the competition presumably was not as stiff.[9] *See id.* at 691-93. Methvin also testified that there were 25 whites and 2 blacks who had been employed longer than Davis and were only E-III's and that there were 6 whites employed longer than Davis who were still at the E-II level. *See id.* at 694. The

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[9]Davis was working in the Birmingham DDS office.

supervisors charged with stating that Dr. Shelton had instructed them to lower blacks' evaluation scores denied both making such statements or being so instructed. *See id.*, Vol. V at 492, 576, 671. Dr. Shelton himself admitted that he had on one occasion, questioned Davis' supervisor about a score that, because of Davis' backlog of cases, seemed too high, but he denied that he had generally instructed supervisors to lower the evaluation scores of blacks. *See id.* at 621. With respect to Lovie Marable, Shelton admitted that he had asked her to sign a release, and in fact had had similar conversations with two other blacks he did not think were "ready" for the positions they were in line for. *See id.* at 614, 664. DDS sought to justify this by presenting evidence of Marable's poor performance on the job[10] and explaining that DDS was under a court order preventing it from passing over blacks appearing on the CE, *see id.* at 613, whereas whites were passed over on 81 different occasions for reasons similar to those inspiring Shelton's request for a release. *Id.*, Vol. VI at 705.

Given the evidence from both sides, we cannot say that the district court clearly erred in finding that DDS acted without discriminatory intent in awarding promotions. Although the plaintiffs' evidence, if believed in its entirety, would give rise to an inference of discriminatory intent, the district court was entitled to credit those witnesses it found most believable and accept one version of the events over another. *See Anderson v. Bessemer City,* 470 U.S. 564, 574-75, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985) (trial judge's finding based on credibility choice between witnesses each telling internally consistent story uncontradicted by extrinsic evidence can "virtually never be clear error"); *United States v. Yellow Cab Co.,* 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed.2d 150 (1949). This is true with regard not only to anecdotal evidence but to expert testimony as well. *See Middleton v. Dan River, Inc.,* 834 F.2d

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[10]Two of Marable's supervisors testified that she committed an excessive number of technical errors in her work and that her average caseload and time to complete cases was about 30% higher than the average for all employees. *See* Record, Vol. V at 520-21, 576. James Methvin testified that in the year Marable was asked to sign the release, she had taken leave time 50 out of 52 weeks. *See id.*, Vol. VI at 705.

903, 910 (11th Cir. 1987) (finding absence of clear error where court believed one expert over another). Moreover, even if the district court had determined to credit the plaintiffs' statistical evidence, that evidence standing alone would have been an insufficient basis on which to find discriminatory intent. *See Carmichael v. Birmingham Saw Works,* 738 F.2d 1126, 1131 (11th Cir. 1984). From the evidence placed before it, the district court concluded that black DDS employees were not intentionally treated any differently from similarly situated white employees with respect to promotions. The court found that the lower evaluations of several of the class members resulted from deficiencies in their work performance and were not the product of any discriminatory intent of the DDS management. There was substantial, internally consistent evidence to support these conclusions. We thus affirm the district court's finding that the plaintiffs failed to prove their claim of disparate treatment in promotions.

B. *The Claim of Disparate Impact*

As noted above, to prevail on a disparate treatment theory, a plaintiff must prove that his or her employer intentionally discriminated in some aspect to the plaintiff's employment. A disparate impact theory is considerably different in that it does not require a showing of any animus on the employer's part. *See Dothan v. Rawlinson,* 433 U.S. 321, 328, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977); *Griggs v. Duke Power Co.,* 401 U.S. 424, 430-32, 91 S.Ct. 849, 853-54, 28 L.Ed.2d 158 (1971). It must be shown, however, that a "facially neutral" employment practice falls more harshly on one group than another. The burden then rests on the employer to show that whatever the unfortunate effect of the practice, the practice bears a "manifest relation" to the job in question, *New York City Transit Authority v. Beazer,* 440 U.S. 568, 587 n. 31, 99 S.Ct. 1355, 1366 n. 31, 59 L.Ed.2d 587 (1979), and is thus justifiable as a business necessity.[11] *Albermarle Paper Co. v.*

[11]We are aware that four members of the Supreme Court recently have indicated that the burden of *proof* on the absence of business necessity rests

Moody, 422 U.S. 405, 425 (1977) (employer must "meet the burden of proving that its tests are 'job related' "); *Griggs,* 401 U.S. at 431, 91 S.Ct. at 853 ("Congress has placed on the employer the burden of showing that any given requirement [bears] a manifest relationship to the employment").

As the Supreme Court has recognized, some class claims may be such that they are cognizable under both a disparate treatment and a disparate impact theory. *See International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977) ("Either theory may, of course, be applied to a particular set of facts."); *see also Griffin v. Carlin,* 755 F.2d 1516, 1526 (11th Cir. 1985) (authorizing challenge to promotion process under disparate impact as well as disparate treatment theories). The plaintiffs' challenge to DDS promotions is just such a claim. The plaintiffs' evidence consisted of allegations of intentional discrimination combined with statistics and testimony intended to show that something about DDS's promotion procedures, facially netural though they were, was operating to deny black employees promotions that similarly situated whites were getting. Thus, to the extent that intentional discrimination was alleged, the plaintiffs' promotion claim is (and has been) properly analyzed as a disparate treatment claim. Yet to the extent that the plaintiffs alleged that DDS's facially neutral promotion procedures operated to exclude them, the promotions claim is properly analyzed under the disparate impact theory.

1. The Practices Properly at Issue

Before we proceed to the merits of the plaintiffs' impact claim, we think it crucial to clarify precisely what practices

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with the plaintiff. *See Watson v. Fort Worth Bank & Trust,* ___ U.S. ___, 108 S.Ct. 2777, 2790, 101 L.Ed.2d 827 (1988). A plurality opinion, however, is not binding precedent, and in the meantime, we are bound by several decisions of this court (as well as the Supreme Court cases cited in the text) stating flatly that the employer bears the burden of *proving* that a practice is job-related. *See, e.g., Craig v. Alabama State University,* 804 F.2d 682, 689 (11th Cir. 1986); *Crawford v. Western Electric Co.,* 745 F.2d 1373, 1384 (11th Cir. 1984).

are properly subject to that impact challenge. DDS and SPD argue vigorously that the plaintiffs are attempting to retry the case on appeal insofar as they are complaining of any promotion practices[12] other than the evaluations by DDS supervisors. Their objection is two-fold. They argue first that the plaintiffs did not present any evidence on the additional practices and never indicated that these practices were part of their promotions claim. In support of this assertion, they cite a post-judgment certificate issued by the district court in accord with Federal Rule of Appellate Procedures 10(e) that reflects the district court's understanding that the promotions claim involved only the evaluations. They also point to the "proposed facts" submitted by the plaintiffs prior to trial, which the defendants say reflects the plaintiffs' limited focus. The defendants also insist that the plaintiffs were not *entitled* to challenge several of the practices to which they now object because SPD was in the case from the beginning only as a "necessary party" under Federal Rule of Civil Procedure 19. In other words, the requirements of working the jobs in order, the minimum-experience requirements, the T & E scoring procedure, and the development of registers and CE's were all exclusively in SPD's domain, and the plaintiffs would have had to name SPD as a full party defendant if these practices were to come properly into issue. In support of this assertion, the defendants point to a colloquy in the record where the plaintiffs' counsel appears to acknowledge SPD's Rule 19 status.

In reviewing the defendants' arguments, it has become clear to us that they misapprehend the respective burdens in a disparate impact case. Whatever impression they and, apparently, the district court may have been under, plaintiffs alleging class-wide discrimination in promotions are not required to isolate the particular aspect of the promotional process that is responsible for the discriminatory impact. As this court held in *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985), some nine moths before the trial here began, the purpose of Title VII

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[12]The defendants do not assert that the plaintiffs have misrepresented Davis' individual claim or the claim involving the selection of AUS's.

> "is not well served by a requirement that the plaintiff in every case pinpoint at the outset the employment practices that cause an observed disparity between those who appear to be comparably qualified. Such a requirement in effect permits challenges only to readily perceptible barriers; it allows subtle barriers to continue to work their discriminatory effects, and thereby thwarts the crucial national purpose that Congress sought to effectuate in Title VII."

Id. at 1529 (quoting *Segar v. Smith,* 738 F.2d 1249, 1271-72 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985)). Thus, to make out a prima facie case under a disparate impact theory, plaintiffs need only put on evidence of a statistically significant disparity between promotions of blacks and similarly situated whites. It is then the *employer's* responsibility to identify the various practices resulting in the promotion decisions and to justify as job-related whichever practices have actually caused the racial disparity.[13] *See id.* at 1527-28.

Because this is currently, and was at the time of trial, the evidentiary framework under which cases alleging disparate impact proceed, DDS and SPD cannot be heard to complain that they thought the promotions challenge was directed only at the supervisory evaluations, or "service ratings." It is true that the plaintiffs' proposed facts read as if they believed that the perceived discrimination resulted primary from the disproportionately low evaluation scores blacks received,[14]

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[13]*Griffin* placed this burden on the employer for sound policy reasons. Employees are unlikely to be aware of every method by which their employer selects persons for promotion, and yet the employer will be fully aware of what went into its decision. Again, we are aware that four Supreme Court Justices have stated that it is the plaintiff's responsibility to identify at the outset all of the practices he or she is challenging, *see Watson,* 108 S.Ct. at 2788, but until this view is accepted by the full Court, we are bound to follow *Griffin. See supra* note 11.

[14]For example, at one point in the pleading the plaintiffs propose to prove that that "[t]here is a direct correlation between the disparity in blacks' being promoted into the upper level jobs and the service ratings they receive from a predominately white supervisory force." Supp. Record, Vol. I, Tab B at 9 ("Proposed facts by Plaintiff"). No similar statements concerning any of the other practices are made, although the practices themselves are described.

but the defendants should have been aware that they would not be able to explain away any disparate impact of the promotion process as a whole simply because the plaintiffs alleged that the most discriminatory practice was the evaluations.

Moreover, much of the trial discussion of the additional practices they now claim are not properly in the case came from the defendants themselves. For in addition to challenging the significance of the plaintiffs' statistics, and instead of simply proving why the subjective evaluations were necessary, the defendants chose to argue that any disparate impact of the promotions process resulted not from the evaluations but from the disparity in blacks' and whites' lengths of service, the primary factor in arriving at the 45% "experience" score.[15] On this point, we turn again to *Griffin.* In *Griffin,* as here, the plaintiffs alleged that the employer had discriminated in awarding promotions. The district court found for the employer, noting that the plaintiffs' statistics were not meaningful because they did not address whether the black employees not promoted had made it onto a register similar to that involved here. This court reversed, and held that the defendants could not, on remand, rely on the practices leading to placement on the register unless those practices themselves were proven free from discriminatory impact. *See Griffin,* 755 F.2d at 1526-28; *see also Watkins v. Scott Paper Co.,* 530 F.2d 1159, 1192-93 (5th Cir.) (experience requirement could not justify disparate impact where "[p]ast discriminatory practices have either prevented or discouraged many of [defendant's] employees from transferring to many lines of progression and from gaining the experience [the defendant] deems necessary in a supervisor"), *cert. denied,* 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139 (1976); *Stevenson v. International Paper Co.,* 516 F.2d 103, 117 (5th Cir. 1975) (lack of experience in a particular line of

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[15]This argument was undoubtedly the reason that the district court included a finding that "[t]he Alabama State Merit System utilized by the DDS in its promotional policies is a permissible use of the seniority system, and its utilization does not discriminate against any class or group of people." Final Judgment Order at 2 (Mar. 27, 1987).

progression does not justify disparity in appointments to supervisor where blacks were excluded from those lines of progression). This case presents an analogous situation in that the defendants here also sought to rebut the allegations of discriminatory impact by relying on practices that themselves might have been discriminatory. Thus, even if the additional practices were not originally in the case, they became subject to the plaintiffs' challenge when the defendants relied on them to rebut the allegations concerning the evaluations.

The defendants' argument concerning SPD's status does not convince us otherwise, for two reasons. First, we are not at all certain, as a factual matter, that SPD *was* only a Rule 19 defendant. There is no mention of Rule 19 in plaintiffs' motion for leave to amend the complaint, in SPD's answer, in the order granting leave to amend, in the pretrial order, or in the final order. Indeed, the district court's memorandum opinion recounts that "the court allowed the plaintiff to amend his complaint and add the Personnel Board of the State of Alabama as a *party* defendant." Memorandum Opinion at 2 (Mar. 27, 1987) (emphasis added). In addition, the exchange relied on so heavily by the defendant[16] falls far short of an "admission" that SPD was only a Rule 19 defendant because it is impossible to tell whether plaintiffs' counsel ever heard the comment to which he allegedly was agreeing. Under these circumstances, we are hesitant even to

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[16]The defendants cite the following passage from the record:

> [SPD ATTORNEY]: Judge, does the Court understand and has understood [sic] all along that we're in for Rule 19 purposes?
> THE COURT: I thought you made that clear.
> [SPD ATTORNEY]: I just wanted to make sure where we were.
> THE COURT: I didn't hear any objection to that statement.
> [PLAINTIFFS' ATTORNEY]: Your Honor, could I ask or beg the Court's indulgence for your position regarding second depositions generally, for future reference?
> THE COURT: I'm not going to give you any advice when I don't have to.
> [PLAINTIFFS' ATTORNEY]: Fair enough.
> (Proceedings concluded at 11:35 a.m.)

Supp. Record, Vol. I, Tab A at 20-21. As indicated, this is the only reference to Rule 19 appearing *anywhere in the record.*

conclude that SPD was in the case only under Rule 19, much less to conclude that SPD's status is an adequate basis on which to drastically limit the plaintiffs' case.

Second, and more importantly, we hold that an employer cannot delegate several aspects of its promotion procedure to another agency such as SPD and then escape liability if that agency develops discriminatory practices. Title VII's remedial purpose requires that an employer be held accountable for practices it, in effect, adopts if those practices have a class-wide discriminatory impact. To hold otherwise would run contrary to cases holding employers responsible for the use of discriminatory tests developed and administered by an outside agency. *See, e.g., James v. Stockham Valves & Fittings Co.,* 559 F.2d 310, 319, 339-40 (5th Cir. 1977) (employer could be held liable for test developed by consultant), *cert. denied,* 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978). It would also conflict with this court's recognition that plaintiffs often are not privy to the information necessary to pinpoint both the precise practices and parties responsible for the discriminatory impact. *See Griffin,* 755 F.2d at 1527-28; *see also Evans v. Sheraton Park Hotel,* 503 F.2d 177, 183 (D.C. Cir. 1977).

In sum, the defendants' reliance on practices other than the evaluations brought those practices properly into issue, and, in fact, this is how Title VII cases were intended to proceed. For only when *all* of an employer's practices are squarely faced and examined can Title VII's purpose of rooting out discrimination be served.

2. The Merits

In attempting to show that DDS' promotion practices had a disparate impact on black employees, the plaintiffs introduced statistics indicating that "the higher the job level to be promoted into, the less likely it is to go to a black." Record, Vol. III at 190. In addition to presenting raw numbers in support of that thesis, the plaintiffs' expert undertook both a standard deviation and a chi-square analysis of DDS promotions from 1977-1986. Using as his expectation benchmark the ratio of all blacks promoted to all employees promoted,

which turned out to be 21.19%, the expert derived the following figures:

Job Promoted Into	Total No. Occurrences	Percent Black Occurrences	Diff. From Expectation	Standard Deviations
E-I	31	48.39	+27.20	3.7
E-II	118	22.88	+1.69	0.45
E-III	52	11.54	−9.65	1.7
S-I	21	9.52	−11.67	1.31
S-II/S-III	14	0.00	−21.19	1.94

Id., Plaintiffs' Exh. 23. The chi-square measure resulting from these figures was, according to plaintiffs' expert, 22.31, indicating that there was only a 2 in 10,000 chance that race and the level to which an employee was promoted were not related. The expert asserted that the chi-square measure was more likely to predict the "overall trend" than the standard deviation analysis.

The plaintiffs also put on evidence indicating that black employees were considerably more likely to receive low evaluation scores than white employees were. Using an expectation benchmark similar to that used for his promotion analysis — the ratio of all evaluations of blacks to all evaluations, or 24.47% — the expert computed the standard deviations and the chi-square measure for the five[17] possible evaluation scores. The results of the standard deviation analysis were as follows:

Evaluation Ranking	Total No. Occurrences	Percent Black Occurrences	Diff. From Expectation	Standard Deviation
1 (lowest)	10	60.00	35.53	2.61
2	28	60.71	36.24	4.46
3	199	50.25	25.78	8.46
4	681	27.90	3.43	2.08
5 (highest)	496	6.65	−17.82	9.23

[17]Since three different ratings systems were used during the period covered by the lawsuit, the expert found it necessary to correlate certain ratings used under one system with those under another. Because two of the the ratings systems had five possible scores, the defendants did not particularly object to correlating scores under those systems. The defendants did object, however, to the expert's equating scores under the one four-score system with those under the five-score system. *See* Record, Vol.

Id., Vol. III at 204-09. The chi-square measure indicated that there was only a 1 in 10,000 chance that race and the evaluation score were not related.[18]

The defendants responded with expert testimony and statistical evidence of their own. The defendants' expert was critical of the plaintiffs' expert for failing to account for several factors other than discrimination that might account for the disparity in black representation in the higher-paying jobs. *See id.*, Vol. VI at 781-84. Chief among these, in the expert's view, was length of service. An exhibit he had compiled indicated that job level and length of service were directly correlated. *See id.*, Def. Exh. 47, Tab 2. Also significant was the percentage of blacks in the "feeder jobs" directly beneath each higher-level job. In other words, it was specious to expect blacks to comprise 21.19% of promotions to the S-I position if there were not that many blacks in the E-III position. A study the expert presented, using what allegedly was the "proper" benchmark, the percentage in the feeder jobs, indicated that blacks were getting a proportional share of the actual promotions. *See id.*, Tab 4. A third factor the expert deemed important was the representation of blacks on the CE's. An analysis employing that benchmark revealed that blacks were actually faring better than whites once the former made it onto the CE. *See id.*, Tab 3.

With respect to the evaluations, the defendants' expert did not quarrel with the fact that blacks' evaluations were consistently lower. He focused instead on the fact that the

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III at 256. The expert explained that it seemed most reasonable to group the two lowest scores under the four-score system with the two lowest under the five-score system, and the two highest under the four-score system with the two highest under the five-score system.

[18]In order to ensure that the statistics were not skewed because they were based on evaluation occurrences rather than on the scores given particular *persons*, the plaintiffs' expert also performed statistical analyses based on the highest and lowest scores black employees had ever received. The expectation benchmark for these studies was the ratio of blacks evaluated to the total number of employees evaluated. The chi-square under both these studies confirmed that reached when the evaluations were studied by their occurrence: under either approach, there was only a 1 in 10,000 chance that race and evaluation score were not related. *See* Record, Plaintiffs' Exhs. 28, 29.

evaluations had not, under a standard deviation analysis, resulted in a statistically significant disparity in blacks' rankings on the register. *See id.,* Vol. VI at 801. On rebuttal, the plaintiffs' expert testified to the contrary. A standard deviation analysis, he claimed, was insufficient to show anything because the numbers in each group were small. A chi-square analysis, however, would make up for the fact that the pools were small, and it showed that the evaluations had a statistically significant effect on certification. *See id.,* Vol. VII at 840-843.

After sifting through all of this evidence, the district court found that "[DDS' promotion] system did not produce an adverse impact on any class or individual." Memorandum Opinion at 25 (Mar. 27, 1987). Relying on *Maddox v. Claytor,* 764 F.2d 1539 (11th Cir. 1985), the court agreed with the defendants that the plaintiffs' impact statistics were flawed because they did not expressly exclude blacks who had not applied or been certified for the higher-paying jobs. The court also found that to the extent that the "experience" factor was causing a disparity in the presence of blacks and whites in the higher-paying positions, it was "a permissible use of the seniority system." Memorandum Opinion at 26 (Mar. 27, 1987).

We can accept neither of these holdings. Under the circumstances of the case, it was improper for the district court to recognize any kind of "seniority system" defense. This court has held that a seniority system defense under section 703(h) of Title VII, *see* 42 U.S.C. § 2000e-2(h) (1982), is an affirmative defense that must be expressly pleaded and included in the pretrial order to be viable. *See, e.g., Jackson v. Seaboard Coast Line R. Co.,* 678 F.2d 992, 1012-13 (11th Cir. 1982). The defendants failed to plead the defense and to have it included in the pretrial order, and in fact disavowed any reliance on the defense when the plaintiffs sought to clarify the defendants' position.[19] *See* Record, Vol. VI at 804.

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[19] It appears the defendants were willing to waive the defense because they mistakenly believed that DDS' reliance on "experience" was not properly an issue in the case. *See supra* part I.A.1. Hence, they thought they could assert seniority as the reason for the disparity without its being the subject of an

Any such defense, therefore, was waived, and the district court should have recognized this.

Similarly, the district court's emphasis on certification was misplaced. It is true that the plaintiffs' statistical comparisons did not distinguish applicants or certified employees from the professional workforce in general. It is also true that in *Maddox v. Claytor,* 764 F.2d at 1539, this court discredited certain of the plaintiffs' statistical studies for this very failure. *See id.* at 1550. In *Maddox,* however, it was undisputed that virtually all of the jobs to which blacks complained they were denied promotions were highly skilled positions. *See id.* at 1542 ("the Base lacked the resources to train its workers for [the white-collar] ICP positions"); *id.* at 1550 (the plaintiffs complained that they did not receive "a great number of positions calling for highly specialized skills"). Here, the positions to which the plaintiffs seek equal access were not "highly skilled" jobs, at least not in the sense that the typical E-I could not fulfill the requirements of a typical E-III. There was testimony, for example, that all of the examiners in a given unit took on the caseloads of other examiners when those examiners went on vacation or were pulled for work on special assignments. *See* Record, Vol. III at 285, 298, 327. There was also testimony from one of the *defendants'* witnesses, a DDS supervisor, that

> there's not a lot of training going on. Everybody who's been there has been working there from five to ten years, usually. And they're pretty well conversant with how they're supposed to do cases. So there's very little training that you refer to that's required. The primary training that's done is in the QA (Quality Assistance, a particular unit) procedures. That is how you write up the case for return, this sort of thing. It's rather mundane as far as anything complicated or foreign or anything like this. Everybody is conversant with what goes on. It's just a matter of getting into the routine.

Id., Vol. V. at 513.

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independent disparate impact challenge, and there was no need to rely on it as a "defense."

In short, while we agree with the general proposition in *Maddox* that statistical comparisons offered in support of a disparate impact claim should be drawn as narrowly as possible to avoid the effects of factors other than discriminatory practices, *see also Hazelwood School District v. United States,* 433 U.S. 299, 308, 97 S.Ct. 2736, 2742, 53 L.Ed.2d 768 (1977), we cannot agree that the plaintiffs' case failed because their statistics were not limited to those blacks certified. From the only evidence in the record on the point, it appears that an uncertified black serving as an E-I was just as likely to be qualified for an E-III position as a certified white serving in an E-II position, even if DDS' procedures did not acknowledge that fact. Furthermore, the plaintiffs would have proven nothing if they had compared the rates of promotion for only those certified. For even if the only issue were the supervisory evaluations, as the defendants insisted, the plaintiffs were attempting to prove that discrimination was occurring in the certification process itself. By requiring that the plaintiffs limit their comparison pool to only those blacks who had been certified, the district court simply begged the question. *See Jackson,* 678 F.2d at 1016-17 ("the Brotherhood's primary position . . . that the appellees were not discriminated against . . . because they had not satisfied the promotion requirements . . . merely begs the question whether or not the promotion provision was justifiable as a business necessity").

Whether the plaintiffs should have limited their statistical comparison to include only those blacks who had *applied* is a more difficult issue. On the one hand, it is conceivable that the disparity in black and white representation in the higher-paying positions resulted from blacks' failure to apply in numbers proportional to their presence in the DDS workforce.[20] The plaintiffs thus might have adopted a benchmark

[20]The defendants insist that their statistics showed that blacks did not suffer any discriminatory impact if they did in fact apply. Their Exhibit 31 purports to show that blacks made up 20.7% of the applicants for the higher-paying positions and yet 24.4% of those actually promoted. We find this exhibit virtually worthless. First, it deals only with the E-II, E-III, and S-I positions, even though the S-II and S-III positions were also at issue.

for comparison purposes reflecting only those blacks who had applied. *Cf. Williams v. Tallahassee Motors, Inc.*, 607 F.2d 689, 692 (5th Cir. 1979) (plaintiff did not make out prima facie case of disparate impact by comparing percentage of blacks hired with percentage of blacks in geographic area), *cert. denied,* 449 U.S. 858, 101 S.Ct. 159, 66 L.Ed.2d 74 (1980). On the other hand, had the plaintiffs done so, they effectively would have conceded that the requirement of working the jobs in order and the requirements that an employee spend a certain amount of time in a "feeder" position were non-discriminatory. For comparing the promotions of only those whites and blacks who applied would necessarily have excluded blacks who might well have been qualified but who learned from the eligibility requirements that an application would be futile. *Cf. International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 367, 97 S.Ct. 1843, 1871, 52 L.Ed.2d 396 (1977) (plaintiffs should not be denied relief solely because discriminatory practices have been "so successful as totally to deter applications from members of minority groups"); *Taylor v. Hudson Pulp & Paper Corp.*, 788 F.2d 1455, 1462 (11th Cir. 1986) (non-applicant amy make out prima facie case by showing application would have been futile), *cert. denied,* ___ U.S. ___, 108 S.Ct. 345, 98 L.Ed.2d 371 (1987).

With this dilemma in mind, we conclude that the plaintiffs failed to raise a sufficient challenge to those practices that would not have automatically rendered blacks ineligible: specifically, the use of the service ratings, and the evaluation

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Second, the data from which the summary exhibit was drawn appears to come from randomly selected years: the E-II numbers come from 1981 and 1983; the E-III numbers from March and September 1981; and the S-I numbers from 1978 and 1982. It may be that these dates correspond to the dates on which the jobs were posted, but the record does not indicate that the dates are anything but random, and the fact that the E-II numbers are drawn from two months in the same year conflicts with testimony that a year had to pass between announcements. Third, the total number of applicants listed is about 200 persons lower than the total number of persons certified appearing on yet another of the defendants' exhibits, a practical impossibility if employees had to apply to be certified. *Compare* Record, Def. Exh. 31 (referring to 188 total applicants) *with id.*, Def. Exh. 30 (referring to 377 employees certified).

of an applicant's training and experience. With regard to these practices, applicant statistics were available, and the plaintiffs should have employed them. With respect to the other practices, however — specifically, the requirement that the jobs be worked in order and the requirement that an applicant for promotion have served a certain amount of time in a "feeder" position — the evidence was sufficient to shift the burden to the defendants to prove that those practices were sufficiently job-related to justify their discriminatory impact. The plaintiffs' statistics showed that blacks were underrepresented in the higher-paying positions,[21] and the defendants acknowledged the disparity. Then, rather than breaking the promotion process into its various components and explaining why each component was job-related, the defendants put on evidence that the disparity was caused by the fact that blacks as a group had not been with the agency as long as whites and thus had not had the same opportunity to work up through the ranks. This might have sufficed as an explanation if it were not entirely possible, in fact likely, that racial discrimination itself was responsible for the difference in blacks' and whites' lengths of service.[22] As it was, instead of rebutting the

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[21]We are aware that the plaintiffs' statistical evidence, as reproduced above, showed that the standard deviations from one particular level to the next were not legally significant, i.e., in none of the categories were there more than two standard deviations. *See Castaneda v. Partida,* 430 U.S. 482, 496 n. 17, 97 S.Ct. 1272, 1281 n. 17, 15 L.Ed.2d 494 (1977) ("As a general rule . . . , if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the [results were] random would be suspect to a social scientist"). This does not mean, however, that the plaintiffs' statistical studies were invalid. Several courts have approved chi-square analysis as an alternative to standard deviation analysis, and the analysis did serve the limited purpose the plaintiffs claimed for it: it showed that blacks were much less likely to be in the higher-paying positions. *See, e.g., Coates v. Johnson & Johnson,* 756 F.2d 524 (7th Cir. 1985); *Capaci v. Katz & Besthoff, Inc.,* 711 F.2d 647 (5th Cir. 1983).

[22]The Personnel Director testified that there were no blacks working for DDS in the 1960's, and that from 1970-1974, only four blacks were hired. *See* Record, Vol. VI at 731-72. There was also testimony that SPD was operating under a court order entered in *United States v. Frazer,* 317 F.Supp. 1079 (M.D. Ala. 1970). The court in *Frazer* found that the State of Alabama had discriminated in its hiring and promotion practices. *See id.* at 1087-88.

plaintiffs' case, the defendants bolstered the idea that certain requirements were perpetuating past discrimination, which, if true, would violate Title VII. *See Giles v. Ireland,* 742 F.2d 1366, 1380 (11th Cir. 1984); *Jepsen v. Florida Board of Regents,* 610 F.2d 1379, 1383 (5th Cir. 1980).

Under these peculiar circumstances, we think it most prudent to remand the case for further proceedings. Although in most instances, findings that a prima facie case of disparate impact has been made and that a defendant failed to respond with a showing of business necessity would warrant a judgment for the plaintiffs, *see, e.g., Jackson,* 678 F.2d at 1016-17, it is painfully clear to us that everyone involved in this case was laboring under serious misconceptions concerning how the case would proceed.[23] We thus do not believe it would bring us any closer to the truth to end the case without offering the parties an opportunity to respond directly to our holdings today. The case should be retried so that the plaintiffs can more clearly show, with their *own* evidence, that the job-progression and minimum experience requirements perpetuated past discrimination and the defendants either that the requirements did not have such an effect or that they were necessary for the agency to operate. The parties should be aware, however, that those issues are the only promotion issues still in the case, and the only ones as to which evidence should be admitted.

II. The Selection of Assistant Unit Supervisors

In addition to challenging DDS' promotion practices, the plaintiffs alleged below that DDS had discriminated against blacks in its appointments to the AUS positions. SPD is not

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[23]The plaintiffs apparently were unaware that the benchmark used for their statistical comparsions had to be drawn as narrowly as possible in order to be considered probative of disparate impact, and the defendants apparently were unaware that practices other than the supervisory evaluations were legitimately in the case. It seems clear that if the defendants had been so aware, they would not have offered the statistics on length of service, and we would be faced directly with determining whether the plaintiffs' statistics alone were sufficient to make out their prima facie case.

implicated by this claim becasue the AUS appointments were handled entirely by DDS officials. In support of this contention, the plaintiffs again offered both statistical and anecdotal evidence. An exhibit prepared from numbers supplied by DDS indicated that of 36 appointments between 1977 and 1986, only 6 were to blacks. *See* Record, Pl. Exh. 11. Several plaintiffs testified that they had met with the Director, Dr. Shelton, in 1978, to complain that they were being denied the opportunity to serve as AUS's, but that he had refused to identify the criteria for the AUS selections and had essentially dismissed them. *See id.*, Vol. III at 105-07, 281-82. Finally, on cross-examination of the Personnel Director, the plaintiffs adduced evidence that the evaluation scores of black AUS's were consistently lower than those of white AUS's. *See id.*, Vol. VI at 762.

DDS responded to this evidence with statistical evidence purporting to show that any disparity in the appointment of blacks was not statistically significant. *See id.*, Def. Exh. 47, Tab 5 at 1-2. Comparing the percentage of blacks in each of the jobs "feeding" the AUS position to those actually appointed,[24] DDS' expert concluded that the selections were not discriminatory. DDS also relied on supervisors' testimony that many of the plaintiffs had not performed well enough to be appoined to the position. *See, e.g., id.*, Vol. V at 506-07, 520-21, 542-43.

Unfortunately, all this evidence from both sides went for naught. For despite having recognized in the class certification that the promotion claim and the AUS claim were independent of one another, the district court made only one statement that can possibly be construed as a finding with respect to the AUS appointments: "Although [the plaintiffs] complained that they had been denied access to the position of AUS because the position was not posted and they had no knowledge of vacancies until the positions were filled, neither was denied access to *a better job* because of not having filled that position." Memorandum Opinion at 23 (Mar. 27,

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[24]We cannot help but note that this benchmark assumes that certain AUS positions were reserved for certain pay grades, an assumption that does not appear to be supported by the record.

1987) (emphasis added). It seems rather clear to us from this statement that the district court thought that discrimination claims were not cognizable under Title VII unless they alleged some direct economic detriment. This conclusion was incorrect: Title VII prohibits discrimination not only in compensation, but in the "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (1982); *see also James v. Stockham Valves & Fittings Co.,* 559 F.2d at 333; *Swint v. Pullman-Standard,* 539 F.2d 77, 93 (5th Cir. 1976).

As a result of this error, and the district court's consequent failure to provide any reviewable findings, we have no choice but to remand this issue along with the remaining promotion issues. On remand, the district court should, on the evidence already presented, consider whether the plaintiffs showed that DDS intentionally discriminated against blacks in selecting AUS's. The district court should also consider, on the evidence presented, whether the plaintiffs proved that the subjective selection procedure was having a discriminatory impact on blacks seeking the appointments, and if so, whether the subjective selection procedure was necessary to DDS' operations. *See Watson v. Fort Worth Bank,* 108 S.Ct. at 2786 (approving disparate impact analysis for subjective employment practices).

III. Davis' Individual Claim

Wholly apart from the class claims, Carl Davis alleged below that he was denied reclassification to an E-III position in 1982 on account of his race. According to Davis, SPD's 1981 reclassification, effective 1982, gave all AUS's automatic E-III status, and although he was working in 1981 as an AUS, he retained his E-II status. According to DDS, Director Shelton submitted three different requests for Davis' reclassification to E-III, but SPD denied them because, unlike the other AUS's who were reclassified, Davis had not yet served a year as an E-II and was thus not eligible to move to E-III status.

The district court accepted the defendants' explanation for Davis' treatment and found that neither agency had intentionally discriminated against Davis in failing to reclas-

sify him. We cannot say that this finding was clearly erroneous. There was uncontradicted evidence that Shelton had sought to have Davis reclassified and that all of the other AUS's reclassified had more than a year of experience as E-II's. We therefore affirm the district court's holding with respect to Davis' individual, disparate treatment claim.

CONCLUSION

The district court's judgment on the plaintiffs' claim that DDS and SPD intentionally discriminated against blacks in awarding promotions is affirmed. The district court's judgment on Carl Davis' individual claim is also affirmed.

With respect to the plaintiffs' allegation that DDS' promotion practices had a disparate impact on black employees, and their claim that the AUS appointments were discriminatory, the district court's judgment is reversed and remanded for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED and REMANDED in part.

APPENDIX C

Carl E. Davis, et al., Plaintiffs v. Alabama Department of Education, et al., Defendants.

United States District Court, Northern District of Alabama, Southern Division. Civil Action No. 82-G-1411-S. March 27, 1987.

Guin, D.J.: The above-mentioned cause came before the court pursuant to 28 U.S.C. § 1343(4); 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § §2201 and 2202, authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.* and Section I of the Act of Congress known as the "Civil Rights Act of 1866." Jurisdiction of the court is invoked to provide injunctive and other relief against racial discrimination in employment, plaintiffs having exhausted administrative remedies required prior to suit.

The original plaintiffs, Larry L. Powers and Carl E. Davis, individually and on behalf of all others similarly situated, brought suit against the Alabama Department of Education, Department of Disability Determination Service, alleging employment promotion discrimination, specifically race discrimination in recruitment, selection of applicants, promotions and hiring policies, as well as other terms, conditions and privileges of employment. Both named plaintiffs, Negro citizens of the United States, are employed by the Disability Determination Service (DDS) in Birmingham, their place of residence.

The defendants, State of Alabama, Department of Disability Determination Service, and the Personnel Board of the State of Alabama, are governmental agencies within the meaning of Title VII of the Civil Rights Act of 1964, as amended. By order of October 8, 1982, the claims of plaintiff Larry L. Powers against defendants were dismissed with prejudice. Carl Davis continued both as individual plaintiff and in his representative capacity. On November 17, 1983, the court allowed the plaintiff to amend his complaint and add the Personnel Board of the State of Alabama as a party defendant.

A joint stipulation on the suitability of maintaining a class action was filed with the court May 22, 1984, at which time the court certified two classes:

> *Class A:* All black professional employees of the Disability Determination Service, Alabama State Department of Education, who were denied, may have been denied, or may be denied promotions to the positions of Examiner II, Examiner III, Supervisor I, and Supervisor II from 1977 until the present.
>
> *Class B:* All black professional employees of the Disability Determination Service, Alabama State Department of Education, who were denied, may have been denied, or may be denied appointment to the position of Assistant Unit Supervisor from 1977 until the present.

Plaintiffs have alleged discrimination in the State's promotion policies within the DDS, a division of the Alabama State Department of Education. By arrangement with the Social Security Administration the agency adjudicates social security disability claims. Within the DDS each unit is composed of one supervisory professional and several examiners. These designated positions, which are the subject of the suit, are governed by the Alabama Merit System Law and the rules of the State Personnel Department. They are classified as follows:

> Disability Determination Examiner I (E-1), Disability Determination Examiner II (E-2), Disability Determination Examiner III (E-3), Disability Determinaiton Supervisor I (S-1), Disability Determination Supervisor II (S-2), and Disability Determination Examiner III (S-3).

The position of Assistant Unit Supervisor, and in-house position, is not covered by the Merit System, and since May 1982 has been classified as an E-3 position.

A beginning professional DDS employee is hired as an E-1. He is responsible for judging a claimant's capability for work as limited by medically determinable impairments in relation to intelligence, psychological ability, age, education, work experience, and vocational skills. His work is performed in accordance with the Social Security regulations, department

policies and procedures. He must have a knowledge of the Social Security Act, particularly Title II and Title XVI. Applicants must have a college degree in business or public administration, sociology, psychology, social work, education, or other closely related areas. In addition to the degree, experience as an education counselor, vocational guidance counselor, social case worker, or worker in a vocational rehabilitation area is required.

When the E-1 advances to the position of E-2 his job encompasses advanced professional work in the field of disability adjudication requiring considerable independent judgment. He should have "considerable" knowledge of the Social Security Act. The degree and initial experience requirements are the same as those of an E-1, except that an E-2 should have considerable experience in the field. A prerequisite for this position is that the examiner must have occupied the position of E-1.

An E-3 is defined as a "highly skilled and responsible professional" who makes final decisions and recommendations on difficult or unusual cases in the determination of disability claims. Additionally, he serves as a quality assurance specialist resolving more difficult cases, as well as training lower-level specialists in specific assignments. He assists in administrative or supervisory duties and occasionally acts in a supervisory capacity. The qualifications for the job differ from the other examiners in that the required level of experience increases, and does the job classification. An E-3 must have been an E-2 for one year's time before becoming eligible for the position.

After having served as an E-3, an employee is eligible to become a Disability Determination Supervisor I (S-1). His job description requires that he serve as a supervisor of a group of specialists involved in determining the validy of initial reconsideration or continuing claims for medical disability. He continues the training program for new specialists with responsibility for selection of employees to remain in service. The job requires considerable independence. The S-1 is supervised by the Assistant Director. Duties are expansive: considerable knowledge of resources and services available

through public and private channels for medical treatment and determination; considerable knowledge of individual health and disability problems and approved methods and basic information relative to their proper evaluation; ability to train a group of disability determination examiners in the application of policies and procedures established to determine medical disability; ability to express oneself clearly and concisely; ability to establish and maintain working relations with public, state and federal officials, professional groups and co-workers.

From S-1 an employee may move into the position known as S-2, and from there into a position known as S-3. Both positions require increased administrative work, and the requirements are commensurate with the higher-level position.

With the exception of an E-1 position, all positions within the upward progression of the DDS are filled by internal promotions from within line progression, and the positions must be worked in sequential order before eligibility for promotion to another job.

[*Promotion Procedures*]

In 1982 the State Personnel Department and Gary Craver and Associates conducted a reclassification study of all state-wide merit system jobs. At that time state agencies were permitted to submit requests for proposed reclassification of employees. In the case of Mr. Davis, DDS requested that on the basis of his working as an assistant unit supervisor that he be reclassified as an E-3. This request was not granted. Instead, reclassification required that all AUS's be selected from E-3's who had served as E-2's for one year prior to selection. Consequently, all E-2 assistant unit supervisors with one year's service were reclassified as E-3's. Those examiners without the requisite time requirement were not upgraded to E-3's.

The assignment and promotion policies of the DDS have been set by the State Personnel Department Guidelines. Applicants must adhere to the procedure to be eligible for promotion. Basically the promotion procedure requires two

steps: (1) the applicant must apply for the job by written application on a prescribed form with the State Personnel Department; and (2) the name of the applicant must be certified by the State Personnel Department and placed on a Certificate of Eligibles. Unless the employee applies and is certified he cannot be promoted. When an opening is to be filled, the Director must give public notice at least two weeks in advance of the time set for closing applications. There is a competitive promotional examination for each classification except E-1 rated employees. Notices of these exams are posted. The evaluation of an applicant's training and experience, 90 per cent of the grade, is performed by the staff at the Personnel Department, with no input by DDS. A raw score is determined. The service ratings made by the Unit Supervisor are approved by the Director of DDS. These subjective ratings, which carry a weight of 10 per cent, are based on an average of the last three evaluations. The Director has the final review.

The names of those certified to DDS by the State Personnel Department must appear on the Certificate of Eligibles taken from the State Register, which lists all employees who have applied for and are eligible for promotion to the job for which they applied. The Register is maintained in Montgomery, and DDS does not have access to it. When a vacancy appears, the State Personnel Department sends the Director of DDS a Certificate of Eligibles, which names the top ten ranked applicants for the job. The DDS does not, however, receive the order in which they are ranked. Only the applicants themselves are notified of their rank on the Register.

To be listed on this Certification of Eligibles, the applicant must have applied for the position and his name must have been certified to DDS by the State Personnel Department, pursuant to the State Merit System. This system, which bases 90 percent of the grade on training and experience (in practical terms, length of time), and 10 per cent on the average of the last three evaluations, is based on a bona fide seniority system governed by Section 703(h) of Title VII, in part reading:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. . . .

Section 703(h), 42 U.S.C. § 2000e-2(b).

[*Davis*]

Carl Davis was certified for the position of E-1, August 11, 1976. Within six weeks, September 22, 1976, he was appointed to the position. From June 1, 1981, to December 1981 he served as an assistant unit supervisor. In the interim he had applied for the position of an E-2 on July 31, 1981. Certification followed on November 24, 1981, with appointment to the position December 9, 1981.[1] Mr. Davis applied for the E-3 post January 3, 1984. He was certified February 8, 1985, and promoted to the position March 4, 1985, following his eligibility certification. This was the first time that he had been eligible. Since December 1981, the plaintiff has been in the Quality Assurance Unit in the main office in Birmingham, never having asked or applied for any other unit.

In reviewing Mr. Davis's work history with the DDS, the court has noted the following:

> (1) He was hired in the E-1 job within 6 weeks after certification.
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> (2) He was promoted to E-2 within three weeks after certification.
>
> (3) He was promoted to E-3 within four weeks after certification.

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[1]The November certification was the first time he had been certified for the position. It must be noted that although Mr. Davis was eligible for promotion to E-2 any time after September 1977, he did not apply for the position until July 1981.

(4) He has been hired for or promoted to each and all state Merit Jobs for which he applied within a matter of weeks after his name was certified.

(5) He was promoted to each job in the exact order in which his name was set forth on the Certificate of Eligibles.

(6) He was never passed over on any Certificate of Eligibles.

(7) He was always promoted ahead of the persons below him on the Certificate of Eligibles.

(8) He could not have been promoted to E-2 prior to his certification in November 1981.

(9) He could not have been promoted to E-3 until he had been an E-2 for one year.

(10) On the first occasion he was certified as E-3 he was promoted to the job.

At the time the reclassification study was conducted by the State in 1981, effective 1982, Mr. Davis was serving in the position of Assistant Unit Supervisor, as were several others. The following chart shows the appointees to the position and their relation to one another:

Assistant Unit Supervisors	*Date Appointed*	*Classification at time Appointment*	*Date of Entry into Job at DDS*
Carl Davis	June 6, 1981	E-1	September 22, 1976
Laraine Messer	reappointment	E-2	July 23, 1980
	March 1981 previous appointment 1977	E-2	March 16, 1973
Bill Earley	March 1981	E-2	September 24, 1973
Norman Ippolito	reappointment		
	March 1981 previous appointment 1976	E-3	December 1, 1972
Cathy Stewart	May 1981	E-2	January 7, 1970

The court has noted that with the exception of Carl Davis, the plaintiff in this case, none of the appointees had the classification of E-1. All were classified as E-2's and had been holding that classification for several years. All four had

begun work with DDS before the plaintiff and all were classified as E-2's prior to the time he was appointed.

Prior to the above 1981 appointments as AUS, Susan Beatty had been appointed an AUS in 1979. Ms. Beatty had been hired at DDS October 6, 1976, two weeks following the employment of Carl Davis. Plaintiff filed an EEOC charge May 29, 1979, alleging race discrimination. The charge was resolved by agreement July 29, 1979, there being no determination or issuance of a right to sue on the charge. Pertinent portions of the agreement follow:

> [I]n the event the position of Assistant Supervisor comes under the State Merit Promotional System, the Charging Party will have equal opportunity to apply for said position.
>
> . . .
>
> [I]n the event an assistant supervisor position (Examiner I Status) becomes available prior to this position's placement under the State Merit Promotional System, the Charging Party will be selected to fill such position.[2]

Following the 1981 appointments, Mr. Davis filed an EEOC charge June 1, 1981, which was amended August 10, 1981, to allege that DDS had failed to promote him to E-2 and that he was the only E-1 working as an assistant unit supervisor.[3] At the time the amended charge was filed, Mr. Davis had not been certified for the E-2 position by the State Personnel Department. His certification on November 24, 1981, was followed by his promotion to E-2, three weeks later. The EEOC Determination issued December 18, 1981, stated:

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[2]Since the position of Assistant Unit Supervisor has never come under the State Merit System the terms of the settlement have not been applicable. Carl Davis was the first E-1 selected for the position after that of Ms. Beatty. Neither Ms. Beatty nor Mr. Davis received any increase in pay nor any credit in his respective ranking on the Register as a result of his appointments to AUS. Ms. Beatty never advanced beyond an E-1 level.

[3]The amendment was filed ten days after he had applied for an E-2 position on July 31, 1981. Susan Beatty never advanced beyond an E-1.

> The Charging Party alleged that Respondent discriminated against him because of his race (Negro) by failing to promote him and, retaliating against [him] for having filed previous charge against Respondent. Examination of the evidence indicates that there is not reasonable cause to believe that the allegation is true.

Had plaintiff been passed over for promotion following his certification, his charge perhaps would have been justified. At the time of the suit, however, it was moot. He lacked standing. Reclassification in December to E-2 still did not give plaintiff the requisite amount of time to qualify for the position of an Assistant Unit Supervisor by the state reclassification.

Pertinent to the job analyses formed in conjunction with the promotions established by the state merit system, the performance of each employee at DDS is evaluated by a DDS supervisor annually on an "Employee Guidance Sheet." An average of the last three evaluations determines ten per cent of the score recorded on the Register kept by the State Personnel Department. The evaluations are subjective ratings and are subject to review by the director of DDS. This evaluation process, particularly the review by the director, has been a source of contention by the plaintiffs in this case. Although the state maintains that the avowed purpose of the reviews is to promote uniformity and to balance the ratings, the plaintiffs contend that the reviews are a means by which they are subjugated into noncompetitive positions for promotion.[4]

Since there have been several editions of the evaluation form, there is no uniformity in the terms employed in the system of grading. From the period ending 1977 through June 19, 1986, Mr. Davis has received the ratings of "Good," "Satisfactory," and "Meets Standards" from four different supervisors. His highest rating of "Good" was given by Olan Anthony for the year ending 1977. In 1980 and 1981, this same supervisor graded his performance as "Satisfactory."

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[4]The review by the director is for the purpose of balancing the differing ratings of the supervisors for uniformity. Some supervisors consistently grade lower than others, while others consistently grade higher.

"Satisfactory" was the same rating given in 1979 by James Gilbert, in 1982 by Ron Gilbreath, and in 1983 by Don Moody, who also served as Mr. Davis's evaluating supervisor from 1983 through 1986. While Mr. Moody evaluated the plaintiff's job performance as "Satisfactory" in January of 1983, since then he has given Mr. Davis the rating of "Meets Standards."

[*Marable*]

Lovie Marable's term of employment with the DDS covered the period of May 16, 1973, to August 22, 1986. During that time she was employed at each of the three examiner levels, her employment as an E-3 lasting approximately six months before her classification was lowered. Her demotion followed a drop in her employee evaluation ratings, a drop which eventually led to her termination. Although Ms. Marable claims that her low evaluations reflected race discrimination on the part of her white supervisors, her lowest ratings as an E-3 of 30 on one occasion and 34 on another were given by her black supervisor, Wanda Thomas. Ms. Marable further claims that her termination was retaliatory for the EEOC charge which she had filed and because of her insistence on promotions.

[*Powers*]

Larry Powers began working at DDS April 3, 1973. At the time he first applied for an Assistant Unit Supervisor in May 1981, he did not have an E-3 classification. He filed an EEOC charge. While the charge was pending he was promoted to AUS in June 1982 when the AUS's were reclassified as E-3's as a result of the reclassification study. He has not advanced beyond the E-3 level.

When Congress enacted the Civil Rights Act of 1964, 42 U.S.C. § 2000f *et seq.*, the specific purpose of Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp. v.*

Green [5 EPD ¶ 8607], 411 U.S. 792, 800 (1973). Although § 703(a) makes it specifically unlawful to discriminate in employment practices, the legislation is not without exceptions. Section 703(h) provides in part that notwithstanding other provisions, it shall not be an unlawful employment practice for an employer to apply different employment standards "pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate."

This language exempting bona fide seniority systems from inclusion in the act reflects the intent of the proponents of the bill prior to its enactment, that seniority rights would not be affected by its passage.

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, *if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis.* He would not be obliged — or indeed, permitted — to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expence of the white workers hired earlier. 110 Cong. Rec. 7213 (1964) (emphasis added). *International Brotherhood of Teamsters v. United States* [14 EPD ¶ 7579], 431 U.S. 324, 350-51, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

Title VII would have no impact on bona fide seniority rights. *Franks v. Bowman Transportation Co.* [11 EPD ¶ 10,777], 424 U.S. 747, 759-762, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976). "[T]he unmistakable purpose of 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." *Teamsters,* at 352; *Jackson v. Seaboard Coast Line R. Co.* [29 EPD ¶ 32,851], 678 F.2d 992 (11th Cir. 1982) (bona fide seniority system protected from attack under 703(h)); *American Tobacco Co. v. Patterson* [28 EPD ¶ 32, 561], 456 U.S. 63, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982) (§ 703(h) exempts from Title VII the disparate impact of a bona fide seniority system and validates

a system based on lines of progression). It must be noted, however, that any seniority system exempted from the legislation's inclusion must be a bona fide seniority system connoting longevity of employment and not a pretext established for the purpose of evading Title VII. *Teamsters,* at 356. *See California Brewers Assn. v. Bryant* [22 EPD ¶ 30,615], 444 U.S. 598, 100 S.Ct. 814, 63 L. Ed. 2d 55 (1980) (equates employment longevity with heightened benefits).

Plaintiff has contended that the defendant failed to plead the defense of the seniority system and is thus precluded from raising the defense at trial. While it is true that the failure to include a defense in the answer or within the pretrial order will normally result in a waiver of the defense,[5] this is not the case in this circuit with respect to seniority systems. The court in *Jackson,* at 1013, held that the 703(h) exemption for bona fide seniority systems constitutes an affirmative defense under Rule 8(c), Federal Rules of Civil Procedure. In essence, the alleged pleading error is rectified.

[*Burden of Proof*]

To establish a prima facie case of racial employment discrimination, the plaintiff must prove the following by a preponderance of the evidence:

> (1) The plaintiff belongs to a racial minority;
> (2) The plaintiff applied for and was qualified for a job for which the employer was seeking applicants;
> (3) The plaintiff was rejected for the position;
> (4) After the plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications.

McDonnell Douglas Corporation v. Green [5 EPD ¶ 8607], 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L. Ed. 2d 688 (1973).[6]

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[5]*Jackson* at 1012; *Chilivis v. S.E.C.,* 673 F.2d 1205, 1208 (11th Cir. 1982); *Funding Systems Leasing Corp. v. Pugh,* 530 F.2d 91, 96 (5th Cir. 1976).

[6]*Teamsters,* at 358, says the importance of the *McDonnell Douglas* test is in placing the burden of proof on the plaintiff to show discrimination was the basis of the employment decision. Plaintiff must show that his rejection was

This *McDonnell Douglas* four-part test is not an inflexible rule, however, but rather a checklist to be applied with caution. "[T]he facts necessarily will vary in Title VII cases, and the specification [above] of the prima facie proof required from respondent is not necessarily applicable in every respect in differing factual situations." *Maddox v. Claytor* [37 EPD ¶ 35,388], 764 F.2d 1539, 1546 (11th Cir. 1985) (quoting *Furnco Construction Corp. v. Waters* [17 EPD ¶ 8401], 438 U.S. 567, 575-76, 98 S.Ct. 2943, 2949, 57 L. Ed. 2d 957, 966 (1978)) (alterations in original). The plaintiff may establish his prima facie case by proving either a disparate impact or disparate treatment.

> *The essential difference between these two tests is that in order to establish disparate treatment proof of discriminatory intent is crucial, although it can in some circumstances be inferred from the fact of mere differences in treatment, whereas to succeed under a theory of disparate impact proof of discriminatory motive is not required.*

Jackson, at 1014.

The Fifth Circuit, in 1986, held that Title VII challenges to an allegedly discretionary promotion system are properly analyzed under the disparate treatment model. *Watson v. Fort Worth Bank & Trust* [41 EPD ¶ 36,633], 798 F.2d 791, 797 (5th Cir. 1986). *See, e.g., Lewis v. N.L.R.B.* [36 EPD ¶ 34,946], 750 F.2d 1266, 1271 n.3 (5th Cir. 1985); *Carroll v. Sears, Roebuck & Company* [32 EPD ¶ 33,738], 708 F.2d 183, 188 (5th Cir. 1983); *Carpenter v. Stephen P. Austin State university* [32 EPD ¶ 33,647], 706 F.2d 608, 620 (5th Cir. 1983); *Pouncy v. Prudential Insurance Co.* [28 EPD ¶ 32,451], 668 F.2d 795, 800 (5th Cir. 1982). While there is some element of discretion in the decision of DDS to call for a Certificate of Eligibles, the method by which the applicants are certified to the DDS is a combination of subjective and objective criteria which calls for the examination of both impact and treatment criteria.

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not based on his inadequate qualifications or the lack of a job opening. *Teamsters,* at 358 n.44.

Under a disparate treatment case the Title VII plaintiff must prove the existence of a pattern and practice of racial discrimination. Intent must be established directly or by inference.[7] Promotional systems which rely on subjective evaluations are treated as disparate treatment cases and are not discriminatory per se. These claims may be distinguished from disparate impact claims in that impact claims involve practices which are facially neutral in their treatment of different groups, but do in fact fall more harshly on one group than another. *International Brotherhood of Teamsters v. United States* [14 EPD ¶ 7579], 431 U.S. 324, 335-36 n.15.

The disparate treatment approach requires the plaintiff to establish a pattern or practice by which the employer has discriminated against him or against a member of a protected class. Single, insignificant, isolated acts do not justify a finding of pattern or practice.[8] Ultimately at issue is whether this pattern or practice has excluded blacks from promotion. Use of this pattern or practice analysis to show a company's standard operating procedure discriminated against blacks carries the *McDonnell Douglas/Burdine*[9] Title VII claim one step further by allowing the introduction of the "regular rather than the unusual practice." *Ardrey v. United Parcel Service* [41 EPD ¶ 36,497], 798 F.2d 679, 682 (4th Cir. 1986). This disparate treatment theory requires the establishment of intent to discriminate by a preponderance of the evidence either direct or circumstantial.

By contrast, under the disparate impact theory, the employer's intent to discriminate is not at issue. "[A] plaintiff

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[7]The Eighth Circuit in *Hervey v. City of Little Rock* [39 EPD ¶ 36,050], 787 F.2d 1223 (8th Cir. 1986) held: "[T]he plaintiff must basically prove that he is a member of a protected class and that the defendant treated him less favorably than similarly situated non-minority employees in circumstances from which intentional discrimination can be inferred."

[8]In the congressional debates recorded at 110 Cong. Rec. 14270 (1964), and reported in *Teamsters* at 336 n.16, Senator Hubert Humphrey explained the "pattern or practice" language: "[A] pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature . . . "

[9]*Texas Dept. of Community Affairs v. Burdine* [25 EPD ¶ 31,544], 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

need only show that a facially neutral employment practice produces a significantly adverse impact on one race."*Bunch v. Bullard* [14 EPD ¶ 36,638], 795 F.2d 384, 392 (5th Cir. 1986). Although employment practices which rely on subjective selection criteria are normally analyzed under the disparate treatment analysis, they do provide the opportunity for discrimination and must be studied with care.

> Because the classification and referral practices complained of effectively turn on discretionary decisions, they do not fall within the category of facially neutral procedures to which the disparate impact model is traditionally applied. *Pouncy v. Prudential Ins. Co. of America,* 668 F.2d 795 (5th Cir. 1982) . . . Selection processes which rely on subjective judgments, despite the corralling of objective standards, provide the opportunity for the intentional discrimination cognizable in a disparate treatment action.

Pegues v. Mississippi State Employment Service [31 EPD ¶ 33,440], 699 F.2d 760, 765 (5th Cir. 1983), *cert. denied* [32 EPD ¶ 33,926], 464 U.S. 991, 104 S.Ct. 482, 78 L. Ed. 2d 679 (1983); *Rowe v. General Motors Corp.* [4 EPD ¶ 7689], 457 F.2d 348, 359 (5th Cir. 1972) (promotional systems which depend upon the subjective evaluation and favorable recommendation of immediate supervisors provide a ready vehicle for discrimination); *Page v. U.S. Industries, Inc.* [33 EPD ¶ 34,249], 736 F.2d 1038 (5th Cir. 1984). Whether the practice of discrimination is tested by the use of subjective or objective criteria, it is well settled in this circuit that the analysis of subjective criteria is not relegated to the disparate treatment analysis. The disparate impact theory may be used to attack subjective as well as objective components of an employment scheme. *Griffin v. Carlin* [36 EPD ¶ 35,132], 755 F.2d 1516, 1522-24 (11th Cir. 1985). Accordingly, this court will utilize both analyses in this action in determining whether there was an intent to discriminate or whether the application of permissible standards did in fact treat one group less favorably than another.

In an effort to establish individual and class claims plaintiff Carl Davis and other individuals who were representatives of

the class testified to alleged instances of discrimination. In doing so, they have compared themselves to selected white employees who they believed to have advanced at a higher rate than they or members of the class had.[10] They did not, however, integrate their individual claims into the overall promotion and progression system of the DDS. Their testimony was used in conjunction with a statistical analysis of the promotion practices of DDS prepared for trial by Dr. Edwin Luther Bradley, Jr., a member of the Department of Biostatistics and Biomathematics at the University of Alabama in Birmingham (UAB).

While individual testimony is useful in establishing racial discrimination, its primary function is in bolstering the statistical evidence presented. In a disparate treatment case, it is necessary to begin with an analysis of the evidence of disproportionate impact by which the statistician concludes that racial discrimination was or was not present. The standard deviation is one of two methods used to access the quantity variable. It is important in defining the normal distribution. Usage of the mean and standard deviation enables comparison of two distributions by which estimates of the percentages in a distribution would fall above and below various values of the variable. The Supreme Court has adopted usage of the two or three standard deviation rule. *Casteneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L. Ed. 2d 498 (1977).

In determining whether there is a significant difference between two samples in a category a chi-square test may be used to compare the frequency with which certain observations would be expected to occur, if chance only were operating, with the frequency that they actually did occur. This chi-square formula may be tested by use of the standard deviation. By beginning with a null hypothesis[11] the statistician is able to draw up a table of expected frequencies. The gap between expected frequencies and those obtained must be shown. The bigger the difference, the less likely it is to

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[10]See pp. 12-13.

[11]An example of a null hypothesis might read: DDS promotes blacks less frequently than whites.

have happened. The chi-square test statistic is then converted into a probability statement.

Plaintiff has used the chi-square test to analyze promotion relative to race. The tests were conducted by Dr. Bradley, who measured "promotion occurrencies." From application of his chi-square formula he concluded that blacks could expect to receive 21.9 per cent of any promotions at DDS within the professional levels. He converted this to a benchmark of 21.2 per cent and applied it to all job classifications to determine the deviation of the expected with the percentage of actual promotions. From these comparisons, he determined the standard deviations to be: 1.7 in E-3 category; 1.3 in S-1 category; 1.94 in S-2 and S-3 categories.

All deviations fall within the acceptable range of the 2/3 rule established by the court in *Casteneda.* Even so, Dr. Bradley's statistics are based on the unsupported hypothesis that all workers in a grade possessed the qualifications for and applied for the positions. He made no provision for Alabama's Merit System which awards for length of time employed and which would reflect inclusion of those with longer service in the higher ranking categories. He gave no consideration to the number of applicants for each position nor did he make provision for certification of eligibles. Rather, he took it for granted that all workers at each grade, no matter what their jobs, possessed the qualifications and applied for the occupations in the next higher rank. As the Court remarked in *Hazelwood:* "When special qualifications are required to fill particular jobs, comparisons to the general populations (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Hazelwood School District v. United States* [14 EPD ¶ 7633], 433 U.S. 299, 308 n.13, 97 S.Ct 2736, 2742 n.13, 53 L. Ed. 2d 768, 777 n.13 (1977).

Under a like analysis in *Maddox,* at 1550, in which the expert witness based his analysis on the faulty hypothesis that all workers in a grade possessed equally the requisite eligibility and specialized qualifications for promotion to higher grades, the court noted: "His general method continued to be one of comparing the number of black promotees to the

number his model assumed should have been promoted; he limited his analysis to the actual groups of applicants for the announced positions. Curiously, he failed to focus on the group of those certified and interviewed."[12]

The court must note that after Mr. Davis's certification for positions within the DDS he was promoted within a matter of weeks. Ms. Marabelle's history shows that as long as her performance was adequate she, too, progressed within the structure. Although both complained that they had been denied access to the position of AUS because the postion was not posted and they had no knowledge of vacancies until the positions were filled, neither was denied access to a better job because of not having filled that position. Mr. Davis was promoted to the position of AUS and Ms. Marabelle attained the ranking of an E-3, the same ranking as that of AUS. Their contention that they were denied promotions because of racial discrimination is without merit.

[*Defense*]

Following the production of the plaintiffs' prima facie case, the defense countered with testimony showing the promotion procedure followed by the DDS. As part of its evidence it presented an analysis of the system prepared by Dr. Ephrim Asher, consultant and economic analyst in the field of employment discrimination cases, who concluded that the DDS system of promotion does not discriminate against any class or group of people. His analysis was based on and reduced to tables showing the following:

(1) The average years of seniority of current professional employees at DDS according to race;

(2) The average years of seniority of current professional employees at DDS according to job category;

(3) The average years of seniority of current professional employees at DDS according to job category and race;

(4) A promotion analysis of certified eligibles for E-2;

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[12]Dr. Bradley worked from an even broader base: all employees in each grade.

(5) A promotion analysis of certified eligibles for E-3;

(6) A promotion analysis of certified eligibles for S-1;

(7) The promotion of blacks into examiner and supervisor positions at DDS during the years 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, and 1985, compared to their representation in the job feeder category at the beginning of the year;

(8) The appointment of blacks into assistant unit supervisor compared to their representation in the respective job-feeder category during 1977-1981;

(9) The appointment of blacks in AUS positions compared to their representation in the respective job-feeder category from 1982-1985;

(10) The 1986 bi-weekly rate of earnings of current professional employees at DDS according to race, job category and seniority;

(11) The impact of the service rating system on the final rank of "E-2" employees during 1981 and 1983 combined;

(12) The impact of the service rating on the final rank of "E-2" employees during 1981;

(13) The impact of the service rating on the final rank of "E-2" employees employed in 1983;

(14) The impact of the service rating system on the final rank of "E-3" employees during 1981 and 1983 combined;

(15) The impact of the service rating system on the final rank of E-3 employees during 1981;

(16) The impact of the service rating system on the final rank of E-3 employees during 1984;

(17) The impact of the service rating system on the final rank of S-1 employees during 1978 and 1982 combined;

(18) The impact of the service rating system on the final rank of S-1 employees during 1978; and

(19) The impact of the service rating system on the final rank of S-1 employees during 1982.

His findings showed that the promotion system at DDS was applied across the board to all employees. Not only was there no intent to discriminate against blacks, but the system did not produce an adverse impact on any class or individual. His

statistical analysis effectively refuted the allegation of discrimination.

Equally important to the plaintiff is the relevant use of statistics at the third stage of litigation to counter the reasons given by the defendant in support of his position. In this action plaintiffs failed to refute the defendants' testimony and statistical evidence showing no employment discrimination at DDS in its promotional procedures. At this third stage plaintiffs failed to show that the reasons advanced by the defendants were not reasons worthy of credence or that they were mere pretexts for discrimination. *Watson,* at 798. *See McDonnell Douglas,* 411 U.S. at 804-05, 93 S.Ct. at 1825.

[*Conclusion*]

Having reviewed all of the evidence it is the opinion of the court that the plaintiffs have failed to carry their burden at this third stage or, alternatively, the plaintiffs have failed to prove a prima facie case. The Alabama State Merit System utilized by the DDS in its promotional policies is a permissible use of the seniority system, and its utilization does not discriminate against any class or group of persons. Neither has its use discriminated against the individual plaintiff. Any difference in treatment between the plaintiffs and anyone else was justified. The articulated legitimate nondiscriminatory reasons offered by the defendants were credible and justified. The EEOC complaints filed by plaintiffs played no part in the speed by which they advanced. No retaliatory action was taken as a result of their filing.

A separate order consistent with this memorandum opinion will be entered contemporaneously herewith.

FINAL JUDGMENT ORDER

This case was tried before the court as a class action pursuant to 28 U.S.C. § 1343(4); 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § § 2201 and 2202, authorized and instituted pursuant to Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § § 2000e *et seq.,* and Section I of the Act of Congress known as the "Civil Rights Act of 1866," by

which plaintiffs alleged discrimination in employment practices at the Birmingham offices of Department of Disability Determination Service (DDS) of the State of Alabama. Having considered all of the evidence and the applicable law, the court is of the opinion that the employment practices of the DDS are not discriminatory. Accordingly, the court finds the following:

(1) The plaintiff failed to carry the burden of proof at the third stage of presentation of evidence or, in the alternative, failed to prove a prima facie case.

(2) The Alabama State Merit System utilized by the DDS in its promotional policies is a permissible use of the seniority system, and its utilization does not discriminate against any class or group of people.

(3) The Alabama State Merit System utilized by the DDS in its promotional policies has not discriminated against the individual plaintiffs.

(4) Any difference in treatment between the plaintiffs and anyone else was justified.

(5) The articulated legitimate nondiscriminatory reasons offered by the defendants were credible and justified.

(6) The EEOC complaints filed by the plaintiffs played no part in the speed by which they advanced, and no retaliatory action was taken against plaintiffs as a result of their having filed the complaints.

Accordingly, in conformity with the Memorandum Opinion entered contemporaneously herewith, it is

Ordered, Adjudged and Decreed that final judgment be and it hereby is entered in favor of the defendants and against the plaintiffs, and plaintiffs shall have and recover nothing of the defendants in this action.

Supreme Court, U.S.
FILED
MAY 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1619 (2)

IN THE

Supreme Court Of The United States

October Term, 1988

ALABAMA DEPARTMENT OF EDUCATION, DEPARTMENT OF DISABILITY DETERMINATION SERVICE, THE PERSONNEL BOARD OF THE STATE OF ALABAMA,

Petitioners

v.

LARRY L. POWERS, et al.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

This case does not present issues which are before the Supreme Court in *Wards Cove Packing, Inc. v. Atonio,* 827 F.2d 439 (9th Cir. 1987), *cert. granted,* 108 S.Ct. 2896 (June 30, 1988), and this Court's decision in *Wards Cove Packing* will not be dispositive of the present case. Moreover, the Court of Appeals' decision is harmonious with the Supreme Court decisions in *Watson v. Fort Worth Bank and Trust,* ___ U.S. ___, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988) and *Price Waterhouse v. Hopkins,* ___ U.S. ___, 57 U.S.L.W. 4469 (May 1, 1989).

Accordingly this case is not controlled either by *Watson* or the issues presented in *Wards Cove Packing.* No new issues have been raised and there is no conflict with prior Supreme Court case law. The issues presented on appeal and addressed in the Petition for Certiorari in this case are:

1. Whether practices identified by plaintiffs and defendants pursuant to proof and rebuttal of impact claims were subject to the impact analysis and burdens of proof established by *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 188 (1971) and its prodgeny.

2. Whether in a disaparate impact case when the evidence has established a direct correlation between the procedures used and racial impact, the defendant employer carries the burden of establishing business necessity of the objective practices identified by the parties.

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Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATEMENT OF THE CASE

Suit was filed by the plaintiffs-respondents on June 25, 1982 alleging classwide and individual race discrimination in employment opportunities in violation of Title VII and 42 U.S.C. Section 1981. The trial court entered an Order certifying a class of black employees denied promotions "from 1977 until the present". After trial on the merits before District Judge J. Foy Guin, the district court ruled that the defendants had not discriminated on the basis of race. In so doing the district court failed to address many of the issues presented in the case. On appeal to the Eleventh Circuit court of appeals, the district court's judgment as to inten-

tional discrimination was affirmed, but the appellate court reversed and remanded the case for further proceedings on the disparate impact claims. The defendant-petitioners thereafter pursued this petition for certiorari.

At the beginning of the period covered by the class allegations the defendant had a stark pattern of racial segregation in its work force. As of January 1, 1977, in a state that was 25% black, the defendant Department of Disability Services (DDS) had a work force that was 13% black, and had only one black person above the entry level positions.[1] Moreover, the historical pattern of race discrimination in employment opportunities by the State of Alabama and its various departments, including the defendants herein, was a matter of official record in *United States v. Frazer,* 317 F. Supp. 1079, 1086-1090 (M.D. Ala. 1970), and *NAACP v. Allen,* 340 F. Supp. 703 (M.D. Ala. 1972).

The pattern of racial stratification which existed at DDS on January 1, 1977 was perpetuated through a variety of discriminatory devices in the years that followed. By January 1, 1978 these patterns had changed very little if at all. There were still no black supervisors and of 14 employees holding Examiner III positions only one was black. Of 29 Examiner II positions there were only 3 blacks. As of January 1, 1979, blacks continued to hold the lowest level jobs and whites continued to hold the upper level jobs despite numerous promotional opportunities and vacancies in the upper level positions which the black employees were qualified to fill. Of the total of 30 promotions in 1978, only two were awarded to black employees: all of the supervisory positions were awarded to whites and of the 19 promotions to Examiner II, only one was black.

By the end of 1981, five years later, there was still not a single black employee who had ever been a supervisor, there

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[1]For blacks, entry level positions were Examiner Assistant, Examiner I and Clerical jobs. Entry level jobs for whites included these positions plus the positions of Examiner II, Examiner III, Supervisor I, Accountant I, Director and Assistant Director. Moreover, only three blacks had been hired at the level of Examiner I, the majority being initially employed at the lower ranking Examiner Assistant and clerical positions.

was only one black who had ever been an Examiner III, and there were only four blacks who reached Examiner II status. Of the five who had advanced beyond the entry level, four had filed EEOC charges prior to receiving their promotions. For the ten year period from the beginning of 1977 to the end of 1986 blacks comprised at least 26.8% of the work force, but received only 18.3% of the promotions above the entry level Examiner I position, most of which promotions for blacks were to the Examiner II level.

After trial on the merits, the district court found as a fact that with the exception of the entry level Examiner I position, positions were filled through internal promotions from within the DDS "line of progression", and that the positions must be worked in sequential order before eligibility for promotion to the next higher level. Although the promotion process included required minimum experience levels to qualify for certification for promotion, these service requirements were not strictly applied to whites who were hired at higher than entry level positions.[2] By contrast, black employees have uniformly been required to move sequentially through the historically white mid-level positions in lock-step fashion regardless of their individual qualifications.

At trial Plaintiffs introduced evidence that a subjective factor in the process, supervisory evaluations, impacted on black promotional opportunities. The defendants did not deny that black evaluations were consistently lower than white evaluations, but challenged the statistical significance of the effect these lower evaluations had on the selection process and proposed statistical evidence asserting that the stratification and pattern of promotions could be explained by other factors. Chief among the defendants criticisms of

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[2]Plaintiffs introduced evidence establishing that at least seven white employees were hired directly into the Examiner II position without prior service in the Examiner I position or any other entry level job, and that at least ten white employees were hired into Examiner III positions without prior experience as Examiner II or Examiner I. Two white employees were also hired into Supervisor I and Accountant I positions without any prior experience in the lower level jobs. There is no explanation in the record for these exceptions to the "line of progression" identified by the district court.

the plaintiffs' statistical proof was that the plaintiffs' expert had failed to account for length of service, certification of eligibility and job level in identifying the pool of eligible employees and projecting the expected representation of blacks among those promoted.[3] In support of this contention, defendants' expert prepared an exhibit and testified that job level and length of service were directly correlated.

With respect to the explanatory factors identified by the defendants, the court of appeals found that although they might have sufficed absent a history of prior discrimination, that it was entirely possible, if in fact not likely, that racial discrimination itself was responsible for the difference in whites' and blacks' length of service. Rather than rebutting the plaintiffs' claims, the defendants' proposed explanation bolstered the idea that the process, or at least certain requirements utilized in the process, perpetuated past discrimination in violation of Title VII.

The district court did not address the discriminatory impact of the entry level, job residency, and service preference factors in the defendants' promotional process, but held, sua sponte, that the system was a bona fide seniority system subject to exclusion under section 703(h) of Title VII. The defendants, however, did not raise this defense either in the pleading or in the pretrial position and in fact had

[3]Defendants required black employees to serve one year in each level before being eligible for promotion to the next higher level. In conjunction with this practice, the defendants employed a certification process which would be activated only on the request of the department. Employees could not apply for a position until an announcement was posted that a new register of eligible applicants was being made. Defendants were not required to and would not request a new register for each vacancy with the result that blacks who met the job experience requirements were not considered for promotion. For example, in a five year period between 1982 and the end of 1986, the defendant used the same list or certificate of eligible employees for selections to fill vacancies for Supervisor I positions. By not calling for a new certification for each vacancy, the DDS prevented the consideration of all employees who met the one year service requirement in the next lower position of Examiner III. At trial the defendants proposed to limit the pool of eligible applicants for each vacancy to those employees in the "feeder" positions (the next lower job classification in the progression) who were on the list, called a Certificate of Eligibles.

specifically disavowed any reliance on section 703(h) when the plaintiffs sought to clarify the defendants' position at trial.[4] The court of appeals held that the defendants had waived the section 703(h) defense and that the district court was in error for its failure to recognize this fact.

The court of appeals remanded the case to the district court for further proceedings, stating that although in most instances the failure of the defendant to respond to proof of discriminatory impact with a showing of business necessity would warrant a judgment for the plaintiffs, that it was clear that all parties were laboring under misconceptions as to how the case would proceed and that all parties should have an opportunity to respond directly to the appellate court's holdings with further proofs.

REASONS FOR DENYING THE WRIT

I. THE PETITION DOES NOT PRESENT ISSUES IDENTICAL TO THOSE PENDING BEFORE THE SUPREME COURT.

The outcome of this case will not be governed by the Supreme Court's decision in *Wards Cove Packing, Inc. v. Antonio,* 827 F.2d 439 (9th Cir. 1987), *cert. granted,* 108 S.Ct. 2896 (June 30, 1988), or by the Court's decision in *Watson v. Fort Worth Bank and Trust,* ___ U.S. ___, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988), because neither case is dispositive of the issues raised on appeal in this case. Although the petitioner states that an issue common to both this case and *Ward's Cove, supra,* is whether the plaintiff in a disparate impact case under Title VII of the Civil Rights Act of 1964 has the burden of identifying at the outset the employment

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[4]Seniority alone cannot explain the racial imbalance in the work force. The undisputed evidence at trial established that many blacks were bypassed by less senior whites. There were at least 42 occasions when less senior whites were promoted ahead of Carl Knight, a black. There were at least 21 occasions when less senior whites were promoted ahead of Larry Powers, a black. There were 118 occasions when less senior whites were promoted ahead of Charles Holt, a black. There were at least 58 times when less senior whites were promoted ahead of Lovie Marable, a black. There were 38 times that this occurred to Janice Bell and Sheila Bledsoe.

practices which have allegedly resulted in disparate impact, this case does not raise that issue.

A. *Plaintiffs and Defendants Identified the Discriminatory Practice at the Outset*

In the current case, the plaintiff at the outset identified the employment practices alleged to be causing racial disparities in employment opportunities, and the defendant responded with proof that it was not the practices challenged by plaintiffs which caused such disparities but was instead certain other practices; specifically seniority and sequential movement through a line of progression were proffered by defendant as explanations for the statistical disparities shown to exist.[5] The plaintiff responded by contending that these alternative practices also had disparate impact because, under the defendant's own proof, they were what caused the observed racial disparities in employment opportunities.

Thus, it was the defendant itself, in combination with the plaintiffs, who identified the practices causing disparate impact on black employees. There is nothing in *Watson, supra,* or logic which indicates that this is not a proper way to proceed in a disparate impact case. It would serve no purpose whatsoever in the enforcement of the Civil Rights Act to allow a defendant to defeat a showing of disparate

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[5] At the trial of this case, the defendant proposed an alternative statistical model to rebut plaintiff's prima facie statistical proof, and in so doing established that the disparate pattern of selections resulted not from the subjective factors specifically challenged by the plaintiffs, but rather from an objective factor:

> For in addition to challenging the statistical significance of the plaintiffs' statistics, and instead of simply proving why the subjective evaluations were necessary, the defendants chose to argue that any disparate impact of the promotions process resulted not from the evaluations but from the disparity in blacks' and whites' length of service, the primary factor in arriving at the 45% 'experience' score . . . Thus, even if the additional practices were not originally in the case, they became subject to the plaintiffs' challenge when the defendants relied on them to rebut the allegations concerning the evaluations.

Opinion below at 854 F.2d 1285, 1293-1294.

impact merely by presenting evidence of alternative criteria causing that impact. For the defendant to merely show that the racial disparities are caused by one criterion rather than another does not dispel the fact that the racial disparities exist or justify a Court's refusal to remedy such disparities. When a defendant responds to proof of racial disparities by presenting proof that such disparities are caused by a criterion other than the one initially attacked by the plaintiff, the plaintiff should then have the right to contend that the alternative criterion also violates the Act because it causes racial disparities by the defendant's own admission and proof.

There is nothing unfair or inequitable about such a result. A defendant which cannot dispute that racial disparities exist, but can only quibble about which of its employment practices causes such disparities, cannot legitimately complain about being required to demonstrate that the alternative practices it articulates as the cause of the discriminatory result are job related or a business necessity, especially where, as here, the discriminatory practice is a discrete objective criterion such as seniority and sequential movement in a line of progression. If this is not the case, then plaintiff's proof of racial disparities in employment opportunities is never really met by any defense responsive to the concerns of Congress in enacting Title VII. Congress wanted to eradicate employment practices which operate as "built — in — headwinds" to the advancement of black employees unless such practices are a business necessity. Thus, defendants have traditionally been allowed to defend by showing either that there are no real statistical disparities or by demonstrating that the practices causing such disparities are necessary to the operation of the business.[6] Both of these lines of defense

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[6]Practices relied on by the defendants to explain the actions taken and the disparate results must have a manifest relationship to the positions sought and must not perpetuate the effects of prior discrimination. *Griggs v. Duke Power Company, infra; Dothard v. Rawlinson, infra; Connecticut v. Teal, infra.* Just as a defendant in a disparate treatment case cannot articulate a discriminatory reason for its actions to rebut a prima facie case of discrimination (e.g., stating that the reason for a challenged decision was

are responsive to the concerns of Title VII, but a defense which merely articulates alternative causes of the racial disparities with no effort to dispel the existence of the disparity or to show that it is necessary is a *non sequitur* in relation to the statutory purposes of achieving equal employment opportunities.

B. *Burdens of Proof*

In a disparate treatment case the plaintiff is not required to prove the ultimate issue of intentional discrimination *vel non* as a part of his prima facie case but instead is only required to prove circumstantial factors which provide an inference of discrimination if unexplained. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Unlike the circumstantial proof in a disparate treatment case, to meet the plaintiffs' *prima facie* burden in a disparate impact case, the plaintiff must conclusively prove the racial correlation between the process challenged and the discriminatory impact (with the defendant doing all it can to rebut such proof by attacking the plaintiffs' statistical standards and assumptions) *before* the burden shifts to the defendant. Thus, the disparate impact order and allocation of proof mirrors that imposed in disparate treatment cases when the ultimate fact of discriminatory intent is proven by the plaintiffs. Then, and only then, the burden of proof shifts to the defendant on the job relatedness or business necessity defense which operates as a type of affirmative defense to the proof of discriminatory impact (i.e., it does not rebut the proof of impact but provides an alterna-

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sex where racial discrimination was alleged), a defendant who chooses to defend an impact case by challenging the plaintiffs' statistical model through the identification of an alternative explanatory factor must also establish the business necessity of the explanatory factor or the defense must fail. See e.g., *City of Los Angeles, Department of Water and Power v. Manhart,* 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (on remand 577 F.2d 98, appeal after remand 652 F.2d 904, *vacated* 103 S.Ct. 2420). Moreover, the use of seniority as a selection criteria for promotions under these circumstances has been held to have disparate impact in violation of Title VII unless it is protected by section 703(h) of the Act, and the defendant-petitioners waived this claim.

tive method of avoiding liability in the nature of an affirmative defense). This is perfectly consistent with this Court's recent decision in *Price Waterhouse v. Hopkins,* 57 U.S.L.W. 4469, 4475 (May 1, 1989), where this Court held that once the ultimate issue of discrimination is proven, then it is permissible to shift a burden of proof to the defendant on issues which do not directly address the ultimate issue of race discrimination but instead operate as an avoidance of that fact and liability.

The identification of a racial disparity and the articulation of a justification for the cause of the disparity mirror the *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) disparate treatment model of a prima facie case and articulation of a legitimate nondiscriminatory reason. The difference between impact and treatment analysis begins at this point. In the treatment model the burden of proving the ultimate fact, discriminatory intent, remains with the plaintiff. In the impact model, however, the ultimate fact, disparate impact is proven with plaintiff's prima facie case, and the burden shifts to the defendant to establish the business justification for the discriminatory factor. See, *Price Waterhouse v. Hopkins,* ___ U.S. ___, 57 U.S.L.W. 4469, 4475 (May 1, 1989).

It is also important to recall that the impact model had its genesis in the statutory allocation of the burdens of proof requiring employers who utilized qualifications which were facially discriminatory to establish that such discriminatory qualifications were job related or a business necessity. See, 42 U.S.C. Sections 2000e-2 (a) and (h); *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 188 (1971); *Albemarle Paper Company v. Moody,* 422 U.S. 405, 95 S.C.t. 2362, 45 L.Ed.2d 280 (1975); *Connecticut v. Teal,* 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982); *Dothard v. Rawlinson,* 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). Unlike the case where the factors are facially discriminatory, however, where facially neutral factors are challenged, the defendant may defend its case by challenging the plaintiff's statistical proof of disparate impact. This can be done by challenging the standard utilized by the plaintiff, see e.g., *Hazelwood*

School District v. U.S., 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977); *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 3009, 92 L.Ed.2d 315 (1986); *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 340, 97 S.Ct. 1843, 1856-57 n.20 and n.23, 52 L.Ed.2d 396, appeal after remand *U.S. Equal Employment Opportunity Commission v. T.I.M.E.D.C., Inc.*, 659 F.2d 690 (1977); *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-621, 94 S.Ct. 1323, 1333, 39 L.Ed.2d 630 (1974), or by establishing that a justifiable or nondiscriminatory factor explains the apparent disparate results. See e.g., *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 2051, 48 L.Ed.2d 597 (1976); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 585, 99 S.Ct. 1355, 1365, 59 L.Ed.2d 587 (1979); *Bazemore v. Friday, supra; Teamsters, supra.*

The issues addressed by the Court in *Ward's Cove* do not include the allocation of the burden of proof of business necessity after identification of an alternative explanatory factor, see *Price Waterhouse, supra*, but rather address the factors to be considered in identifying the relevant applicant pool on which the statistical evidence should be based. The issues raised in *Ward's Cove* have been addressed by the Court in earlier cases and the Court has identified at least three possible pools: (1) actual applicants, usually called an applicant flow analysis, see e.g., *Beazer, supra; Hazelwood, supra; Teamsters, supra;* (2) actual and potential applicants, ordinarily used where the application process has been tainted by factors which limited access or success in completing the application process making the pool of actual applicants an unreliable basis for statistical analysis since it would reflect the discrimination itself and where special knowledge, skills or abilities are necessary to performance of the jobs sought, see e.g., *Teamsters, supra; Mayor v. Educational Equality League, supra; Hazelwood, supra;* (3) the general population from which the employer would normally drawn its work force, a model ordinarily reserved to analysis of selections for unskilled jobs or jobs for which skills are obtained through on the job training, see e.g., *Dothard v. Rawlinson, supra; Teamsters, supra; Hazelwood, supra.*

In reviewing this case, the appellate court correctly held that the pool must be drawn as narrowly as possible to be considered probative of impact. In reversing the district court, however, the appellate court did not address the issue of the appropriate "pool" on which the statistical analysis should be based since the defendant-petitioners' own statistics and expert testimony established that the disparate pattern of selections was the result of an identified objective factor. The appropriate pool is therefore not at issue. Moreover, the pool selected was the appropriate pool (the work force as a whole) since the objective factors "identified" by the defendant to rebut the plaintiffs' statistics restricted applications and perpetuated prior discriminatory practices. Neither the pool of actual applicants nor the general population of the state of Alabama was more appropriate since the former was tainted by the process itself and the latter would include individuals who did not possess the skills, knowledge, or abilities required to perform the duties of the positions.[7]

The other issues raised in *Ward's Cove*, the use of nepotism and separate recruiting practices for hiring skilled and unskilled workers are not raised in this case, and present special problems which do not arise in a "merit" promotion system. *Ward's Cove* does not address the issue whether an explanatory factor proposed by the defendant to explain disparate promotional results is a legitimate defense to a disparate impact case where the defendant has not indicated that the proposed factor has a manifest relationship to the positions in question. Nor does *Ward's Cove* raise the issue of the burden of proof as to business necessity, but rather addresses the issue of appropriate statistical standards as discussed above.

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[7]It is important to note that while the minimum qualifications for entry level employment are not at issue, the typical Examiner I could fulfill the requirements of a typical Examiner III. Evidence at trial established that there was not a lot of training going on and that everyone in the department ws conversant with what went on in the department. Opinion below at 1297.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE PLURALITY DECISION OF THIS COURT IN *WATSON*

The dispositive issue in *Watson, surpa,* was whether subjective processes as distinguished from objective factors could be analyzed under a disparate impact model. Neither the district court nor the appellate court in *Watson* entered any findings regarding plaintiff's prima facie statistical case since the lower courts, relying on binding circuit precedent, had refused to apply the disparate impact model to the challenged subjective processes. Although the plurality opinion discussed issues related to the proof model to be applied to disparate impact analysis of subjective proceses, the discussion was not based on specific factual determinations and therefore was merely an abstract discussion intended to provide some guidance as to the opinions of the four jsutices who concurred in the plurality opinion, and in which they indicated that the analysis of subjective processes should be differentiated from the analysis of objective processes.[8] See, *Price Waterhouse, supra.*

The petitioners assert that the appellate court ignored language in *Watson* indicating that plaintiffs must identify

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[8]*Watson, supra,* at 2787. The plurality opinion makes it clear in II-c that a distinction should be made between objective criteria which can be readily justified as "business necessities" through validation studies designed to address "discrete selection criteria", and "subjective selection criteria" which cannot be measured accurately through standardized testing techniques. Justice O'Connor wrote, in an opinion joined by Chief Justice Rehnquist, Justice White and Justice Scalia, that "Respondent and the United States are thus correct when they argue that extending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted . . . Because Congress has so clearly and emphatically expressed its intent that Title VII not lead to this result, we think it imperative to explain in some detail why the evidentiary standards that apply in these cases should serve as adequate safeguards against the danger that Congress recognized. Our previous decisions offer guidance, but today's extension of disparate impact analysis calls for a fresh and somewhat closer examination of the constraints that operate to keep that analysis within its proper bounds."

the particular aspect of the process being challenged, and that the respondents were permitted to present additional contentions on appeal which *they* had not raised at trial and which were not addressed by the district court's opinion. In fact these issues were raised at trial pursuant to the respondents' defense that alternative factors explained the disparate impact. On appeal the plaintiffs challenged the district court's failure to address the legitimacy of the factors not only identified by the defendants, but proven by the defendants to be directly correlated to the race of the employees. Although the process challenged in this case had both objective and subjective elements, the factor identified by the defendants as causing a discriminatory impact was an objective factor: length of service.

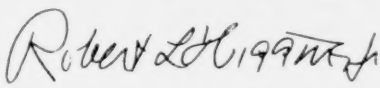
The petitioners also assert that the Court reserved issues in *Watson* for later consideration. However, the plurality decision in *Watson* did not change law or reserve issues for later resolution but rather asserted that *existing* law provided sufficient guidelines which could be applied to impact analysis of subjective proceses. See also, *Price Waterhouse, supra.* This case is therefore distinguishable from *American Textile Manufacturers Institute v. Donovan,* 452 U.S. 490, 495 (1981) and *United States v. Martinez-Fuerte,* 428 U.S. 543, 545 (1976). Even the petitioners agree that the burdens of proof under the impact theory as applied to objective processes have been repeatedly addressed by this Court since the theory was first recognized in *Griggs,* that *Albemarle Paper Co. v. Moody* clearly established the shifting burden of proof in impact cases in 1975, and that the Court of Appeals followed the established law. Moreover, the language cited by petitioners from *Watson* refer to proof of impact as the ultimate burden, not proof of business necessity: "the ultimate burden of proving *that discrimination against a protected group has been caused by a specific employment practice* remains with the plaintiff at all times." Finally, in *Price Waterhouse, supra,* this Court has made it absolutely clear that "it is the employer's burden to justify decisions resulting from [use of an illegitimate criterion to distinguish among employees]." *Id.* at 4475. *Watson* is not

dispositive of the issues raised on appeal in this case and provides no new principles to be applied to this case.

CONCLUSION

This case does not address any issues reserved by the Court for later consideration or of first impression on which there is disagreement between the circuits requiring a decision by the Court nor is it controlled by the issues raised in either *Ward's Cove* or *Watson*. The petition for certiorari is due to be denied.

Respectfully submitted,



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